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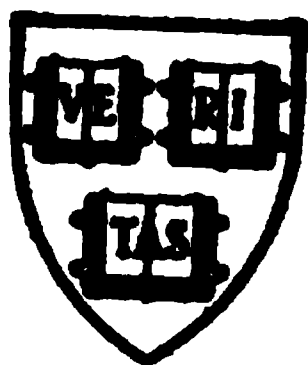
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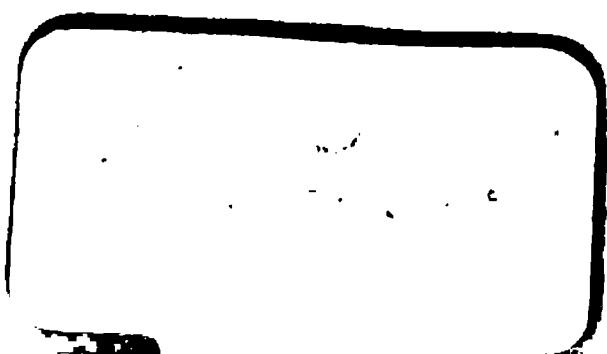
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VOL. 10 ROBINSON-LOUISIANA REPORTS.

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4

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

LOUISIANA.

By MERRITT M. ROBINSON.

VOLUME X.

FROM 1 MARCH, TO 20 JUNE, 1845.

NEW ORLEANS.

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JUDGES
OF THE
SUPREME COURT,

DURING THE TIME OF THESE REPORTS.

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

ATTORNEY GENERAL.
ISAAC T. PRESTON, Esq.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
EASTERN DISTRICT, AT NEW ORLEANS,
MARCH, 1845.

PRESENT :

HON. FRANCOIS XAVIER MARTIN.
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

**THE POLICE JURY OF THE PARISH OF JEFFERSON v. FRANÇOIS
VALCOUR VOLANT LABARRE and others.**

THE SAME v. THE ST. MARY'S MARKET STEAM FERRY COMPANY.

THE SAME v. WILLIAM REILLY.

APPEALS from the District Court of the First District, *Buchanan, J.*

***J. Seghers*, for the appellants.**

***L. Janin, Wills, and Preston*, for the defendants.**

GARLAND, J. These cases originated in the Parish Court of the parish of Jefferson, and the object of all of them being the same, they were tried together in the court below, and, by an agreement in the record, the evidence in one case is to be used in all in this court ; and they have been argued together, upon

The Police Jury of Jefferson v. Labarre and others.

the appeal of the plaintiffs, from the judgment of the District Court, reversing that of the Parish Court, on the appeal taken from it. The allegation, or charge in the petitions is, that the defendants "have constructed buildings and fences on their property at Gretna, which have been denounced by the syndic of the ward as obstructing the space reserved for public use, in contravention of the police regulations;" that they have failed to obey the order given by the Parish Judge to remove these obstructions, whereby each of the parties have become liable to a forfeiture of forty-nine dollars, "and to have the said works removed at their expense." The prayer is, that each defendant be condemned to pay the sum of forty-nine dollars to the parish treasurer, "due by them as aforesaid to the said parish; and that the aforesaid buildings and fences be removed or destroyed at their expense."

The defendants first except to the jurisdiction of the parish court because they say the judge thereof is the president of the police jury, and consequently one of the members of the corporation that institutes the proceedings; and they further say that, if they should be compelled to pull down their building, and to pay the forfeiture claimed, the damages each of them would sustain would exceed \$1000; that, therefore, the Parish Court had no jurisdiction. The answer commences by a general denial of all the allegations; and specially alleges that the space required by law, along the bank of the Mississippi, has been left between their houses and enclosures. They further say, that the public road, which formerly ran in front of the tract of land on which Gretna now stands, has, by the consent and sufferance of the plaintiffs, been established in the street called Front street, which is in good repair and condition, and equally, if not more convenient, to the public. The defendants proceed to call their vendors in warranty, and pray for judgment against them, in case they are disturbed in their possession.

The exceptions to the capacity of the judge to try the case, and as to the amount of damages involved exceeding his jurisdiction, were never decided on, in either the Parish, or District courts; yet the counsel for the defendants urges them upon us, as if they had been.

The Police Jury of Jefferson v. Labarre and others.

It is admitted, that the value of the buildings and enclosures sought to be removed, exceeds \$300; further, that the defendants "keep the tow-path of sixty feet, required by law, at the disposal of the public;" and further, "that the plaintiffs claim is confined to the site of the old road, and to compel the defendants to keep or repair the levée according to the ordinance." There is no allegation in the petition, that the levée is out of repair, nor any distinct one, that the public road has been obstructed; still the whole time of the court below, and of this, has been occupied with that question; it being shown that the levée is in good order.

Mechanics Village and Gretna, are laid off on a bend of the river; the former is above, and was first surveyed into squares and streets. The public road that was in front, ran close to the levée, following it; but by the plan of the Village, it was run straight. An ordinance of the Police Jury, requires all plans of towns or villages laid out in the parish, to be submitted to them for approval, and a copy deposited in the office of the judge of the parish. Whether that of Mechanics Village was so submitted and approved, the record does not inform us; but there is no complaint made of its not having been produced. When Gretna was laid out, in 1839, the plan made shows that the surveyor continued the road in a direct line, calling it Front street; the consequence is, that the lower end of the street is about 200 feet from the river. On this space, two squares were laid out into lots, but between them there is a wide street, and on the lower side a public road, both reaching the levée. The buildings and enclosures of the defendants are on these squares; and between them and the *break* of the bank at high water, there is about 60 feet open for a tow-path. This plan, it appears, was submitted to the Police Jury, on the 2d of May, 1842, and was approved with a proviso, that "a space of ground, at least 100 feet wide, commencing from the bank of the river, at high water, be always reserved for the public road, levée, and landing place." On the 16th of the same month, the président of the Steam Ferry Company, and a great number, if not all the proprietors of property in Gretna, presented their petition to the Police Jury, representing that property had been sold ac-

The Police Jury of Jefferson v. Labarre and others.

according to the plan; that an open space of 60 feet along the river, in front of the Village, was sufficient for every useful purpose; and therefore, they prayed that the plan be adopted as presented, and the proviso to the resolution modified. These petitions, it appears from the journal of the Jury, were "read and laid upon the table, subject to call;" and no vote or action appears to have been had on them afterwards.

The evidence further shows, that by following Front street to its termination, and then the road to the levée, the distance is not much greater than if the road continued along the levée, and the public convenience is as much promoted, as if the street was on the site of the old road. The judge below, in his judgment, informs us, that he went to the place, and inspected the premises, and ascertained that what purports to be a copy of the original plan of Gretna, was incorrect, and that, in fact the front of the square in which Labarre's property is situated, is open and in good repair, and a wide street on all sides of it. The site of the old road in front of the square adjoining Mechanicsville, is, he says, obstructed; but it is no public inconvenience, as Front street affords every reasonable facility; and he dismisses the suits as being "groundless and vexatious."

In the case of the same plaintiffs against Eastman, (9 Rob. 297,) stated in considerable detail, the extensive powers conferred by the legislature on the Police Jury of the parish of Jefferson, and also referred to some of their ordinances in relation to roads and levées. These suits are based upon their ordinances, and they make a marked difference between the tow-path and the public road, as also in the penalty for obstructing the one or the other. The 4th article of the ordinance relative to levées, ways, ditches, &c., imposes a fine of \$25 on any person, who shall "obstruct the passage on land reserved for public ways," (*chemins publics*), and this fine can be recovered for every time the persons so obstructing the way, shall refuse, or neglect to remove it when required by the syndic of the ward. This fine the petition does not claim; nor does it charge any breach of the ordinance, but alleges the infraction of another ordinance, and claims the imposition of a fine of \$49, whilst it is admitted in the record, that there has been no breach of it, as the tow-path, or reserved space, is open.

Clarke and others v. Lockhart and others.

It is necessary for the public convenience, that the Police Juries shall be sustained in the exercise of their legitimate powers in relation to roads and levées ; but it is also important that we should see that the laws relative to there being some certainty in demands being properly presented to courts, should be preserved, and take care not to give a judgment for a penalty not claimed, or for one claimed where it is admitted that there has been no breach of the law. Besides this, we are not aware of any law that authorizes the Parish Court to entertain a demand for \$25, unless in case of appeal from a justice of the peace. We are, therefore, of opinion, that the District Court did not err in reversing the judgments of the Parish Court in these cases, and in dismissing them.

Judgments affirmed.

CLARKE and others v. THOMAS LOCKHART and others.

A vendor is bound to explain himself clearly as to the extent of his obligations ; and the exhibition of a sample implies a warranty, that the thing sold by it shall, in general, conform thereto. C. C. 2449. Any secret or hidden defects must be declared, or he who conceals them will be bound to indemnify the party imposed on by such concealment. So the vendor will be bound to indemnify the purchaser, though the inferiority of the thing sold result from the acts of his agent, without his knowledge or consent ; and the measure of damages is the difference between the price given, and that which would have been given, had there been no deception. But where both the vendors, and the purchasers, or their agents, whose knowledge is binding on them, know what the probable hidden defects are, the former are not bound to indemnify the latter ; as where cotton brought from certain sections of country, is known not to be of uniform quality throughout the bale, and the notoriety of the fact lowers the price which it commands in the market, the mere fact that the quality was not equal throughout, unaccompanied with any proof of fraud will not render the vendors liable to the purchaser.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

GARLAND, J. The petitioners allege, that in the month of May, 1841, they purchased, through Holt & Arrowsmith, their agents in New Orleans, of the defendants, 1215 bales of cotton, weighing 544,312 pounds, at the price of nine and a half cents per pound. That the purchase was made by samples drawn from

Clarke and others v. Lockhart and others.

said bales, whereby the vendors, by implication of law, warranted the quality of the cotton contained in said bales, to be at least equal to that of the samples drawn from them, and that a sound price was paid for said cotton, on the said implied warranty. That the cotton was soon after shipped to Bristol, in England, where it was opened and examined, when it was discovered, "that in 833 of said bales, "the cotton was packed in the manner usually termed *plated*, or falsely packed, that is to say, the cotton in the interior of the bales was of a different and inferior quality, to that on the outside, and to that contained in those parts of the bales from which samples were drawn." That said 833 bales contained 373,972 pounds of cotton, which was worth three farthings per pound less than it would have been worth, if the interior and exterior parts of the bales had corresponded. That the said difference in value, amounts to the sum of £1168, 13s. 3d. sterling; and that a further sum of £118, 18s. 11d., was expended in having said cotton examined, and in discriminating between the bales falsely packed and those not; for which sums, amounting to \$6232 62, they pray for judgment against the defendants.

The answer of the defendants, states that, as factors, they sold to Holt & Arrowsmith, through the agency of Megget & Bergerot, brokers, on the 25th May, 1841, twelve hundred and fifteen bales of cotton, with the numbers and marks set forth in a statement filed, which also contains the names of the shippers of the cotton to them. They say, that the cotton was grown in North Alabama and Tennessee, which fact was known to the purchasers, and that they (the respondents,) sold it in the same condition in which it was received by them, and that they were not the owners of the cotton, but agents for selling the same. That it is not a fact, that the cotton was sold by samples furnished by them; but that the quality was ascertained by the brokers, acting as the agents of the purchasers. That if the cotton was falsely packed, they are not responsible therefor, as they were ignorant of it, and acted in the matter as agents of the owners, (whose names are furnished), which fact was known to the purchasers, and that, as such agents, they have accounted for the price to their respective principals. The respondents

further deny, that the cotton sold by them was falsely packed, or *plated*. They say, that it is the case with all the cotton grown and packed in Tennessee and North Alabama, that it is not throughout the bales of a like quality and condition, which is caused by the different pickings of the crop being mixed together, and the crops from different plantations being often baled together at a common gin, all of which facts are well known to the factors and purchasers in the New Orleans market, and materially affect the price of cotton from that quarter of the country; and that said facts were known to Holt & Arrowsmith, and the brokers employed by them.

The evidence is, that Holt & Arrowsmith, who were merchants in New Orleans, were authorized by the plaintiffs, who are cotton spinners and manufacturers at Bristol, in England, to purchase for them a quantity of cotton. They employed Megget & Bergerot as brokers, to buy it for them. The first named of this firm call on the defendants to purchase, and was shown, in their office, the samples of the cotton drawn by them, on which the sale was made. After the contract was entered into, the brokers, as agents of the purchasers, went to the warehouse, where the cotton was stored, and every bale of it was turned out, and examined by them, and another sample drawn from each bale, which was compared with the samples shown by the defendants, and found to correspond. If they had not corresponded, the brokers say, that they would, according to the custom of the market, have refused to receive the cotton, and have thrown up the sale, or claimed a deduction from the price. The examination proving satisfactory, the cotton was received and paid for; and it is admitted that the defendants have accounted to the owners of it for the proceeds. In drawing the samples, the brokers say, that they were drawn from whichever side of the bale was uppermost, and that the bagging was not cut at any particular place; but that the whole examination was made in the usual manner. One of the brokers further states that he was told by the purchaser that it was not necessary to classify or divide the cotton into the different qualities, as it was not to be resold, and was bought for the manufacturers, but to put it all as one class; but that, at the request of Lockhart, one of the defen-

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dants, who said that the lot consisted of a number of crops, he did classify it; and that it could, with great propriety, be divided into three or four different classes or qualities. The cotton was all purchased at an average price of nine and a half cents; although some was worth much more, and some less. This is proved, by several brokers and purchasers, to be the usual mode of buying cotton in the New Orleans market. It is further shown by the most conclusive evidence, that it is well known to brokers, factors, and purchasers, that the lower qualities of the cotton grown and packed in Tennessee and North Alabama, do not run so regularly through the bales, as the cotton of Mississippi and Louisiana does; that is, that cotton of various qualities and color is often found in the same bale. This fact is proved to have been known to the brokers and purchasers in this instance; and in consequence of the notoriety of this fact, the price of the article is much affected by it, some brokers say to the extent of a cent in the pound. Sometimes the worst part of the cotton is at the place where the sample is taken, and sometimes the best, and the whole bale is judged by the sample. The brokers and purchasers say that the causes of this difference is, that the different pickings of the same crop are put into the same bale; that different crops are mixed, sometimes at a common gin; and that the planters generally are not so particular in separating the different qualities, as those in Mississippi and Louisiana. Meggett says that, as a general rule, he would not advise a purchaser to give the same price for Tennessee and North Alabama cotton, that he would for Louisiana and Mississippi of the same appearance. Holt, one of the purchasers of the cotton, says, that he is acquainted with the Tennessee and North Alabama cottons. That he has a prejudice against them, and that when he buys them, he does not expect them to run regularly through the bale, as he does the cotton of this State and Mississippi. He says, that the staple is not so good; that it does not suit his friends, and will not bring so good a price in Liverpool, because he considers they run some risk with the one, which they do not with the other.

In the latter part of May, 1841, the cotton was shipped to Bristol, consigned to the plaintiffs. When it was landed from

the ships, about the middle of July, it was again sampled by the plaintiffs, and no complaint was made about it. Three hundred and seventy bales were hauled from the wharf to the mills ; and eight hundred and forty-five were stored in the plaintiffs' warehouses. None of the cotton was opened until about the middle of October, between which period and the date of the purchase, it is proved that cotton had fallen considerably in value. When, at the mills, it was opened for the purpose of being used, complaints were made by the agents, or superintendents, and reports of its condition were made to the plaintiffs, or their special managers. A particular examination of it was ordered, and several individuals connected with the mills testify, that there was cotton of different qualities in three hundred and one of those bales ; that the interior did not correspond with the exterior ; that the cotton, to some extent, was "dirty, foxey, and clotted," inferior inside of the bales, and on the outside, fair, merchantable cotton ; and that the cotton was falsely packed originally. For the purpose of making an examination of the 845 bales that were in the ware-houses at Bristol, two brokers were sent for to Liverpool, a distance of 220 miles, because, as it is stated, Bristol not being a cotton market, there were no persons there competent to form a correct opinion as to the condition of the cotton, and the difference in value. These brokers examined the cotton in the ware-houses ; but although they had been brought from so great a distance, they never went to the mills at all, and never saw the cotton there. They swear, that every bale was opened in their presence, and examined by them. That the cotton was of a different quality inside the bales from that on the outside ; that different qualities were in the same bale ; that some was stained and of an inferior staple ; and that 532 bales were *falsely packed*. A young man in the employ of the plaintiffs, as a keeper of their ware-house, also testifies, that he was with the two brokers during the whole examination, keeping a list of the bales condemned, or approved ; that it was obvious that the cotton was falsely or fraudulently packed ; that the inside of the bales contained cotton so little resembling the outside, as to be clear to an ordinary observer. The brokers say, that they examined the cotton under the belief "that the

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same was more or less falsely packed," and that the examination was made at the request of the plaintiffs; and being asked what they mean by the term *falsely packed*, they say it is, "when the quality at the fair, or sampling end of a bale, is better than the interior of the same bale." They further say, that "the market value in Liverpool, according to the samples taken from the sampling end, in the ordinary way, on the 25th of May, was 6½d. per lb., and at the time of the examination, 5½d. per lb.; that in its fraudulent state, it would have been worth ½d. per lb. less." The outsides of the bales were not all alike, nor were the insides; in many there were various qualities of cotton. They did not separate the bad from the good cotton; and cannot tell what the proportion was. The bales were in good order, and the outside was rather more free from leaf, or cleaner, and of a better color than the interior. None of the witnesses in England know of any difference in the mode of packing cotton in Tennessee and Alabama, and in Louisiana and Mississippi. They all say, that uniformity throughout the bale is expected; and that various qualities of cotton are not expected to be in the same bale; if there be, they consider it fraudulent packing.

The defendants gave in evidence, the depositions of a number of planters and overseers, taken in Alabama, which prove that the lot of cotton sold to the plaintiffs, was made up of a number of crops belonging to persons in four or five different counties in that State. That the season for gathering the crop of 1840 was an unfavorable one, being very wet; and that in consequence of this the quality of the cotton varied very much. All the witnesses state, that it is not the practice in that section of country to separate the different pickings or qualities of cotton; but that the whole is *ginned*, and pressed into bales as it is taken from the mass. They say, that no pains were taken in pressing, to put the good cotton on the outside of the bales, and that of an inferior quality inside; and that it was as probable the bad would be outside and the good inside, as the reverse. There is no evidence of any of the bales being what is called *plated*; nor is it pretended that there was any thing in them but cotton of some kind. The complaint is, that it was of dif-

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ferent qualities, "and did not run through the bales regularly," in conformity with the sample.

There was a judgment in favor of the plaintiffs for \$4,000; and the defendants have appealed.

It is a well settled principle of law, that a seller is bound to explain himself clearly as to the extent of his obligations; and the exhibition of a sample implies a warranty that the thing sold by it shall, in general, be in conformity to it. The sample is a tacit representation of the quality of the merchandize sold. Civil Code, art. 2449. 1 Mart. N. S. 312. 4 Robinson, 315. A planter who sells his produce to a merchant, is as much bound to act in good faith as the latter is in selling him his merchandize. If there be any secret or hidden defects they must be declared; and, if not, he who conceals them must indemnify the party imposed upon by such concealment. A planter is bound to indemnify the purchaser of his cotton, if his agent (even without his consent or knowledge,) has *plated* it, or placed cotton seed, or trash, or stones, or blocks of wood, or any thing else in the middle of the bale, so as to impose upon the purchaser; and the measure of the damages, is the difference between the price given, and that which would have been given had there been no deception practised.

The counsel on both sides admit the law to be as stated, and they only differ as to the application of the facts of this case to it. Our opinion is, that it cannot, with propriety, be said that there is a concealment of the defects of a thing when both parties know what the probable hidden defects are. We have said that there is no evidence that the cotton was *plated*; nor are we by any means satisfied that there was a simultaneous fraudulent packing of the cotton sold by forty or fifty planters, or their agents, in four or five different counties in Alabama. The counsel for the plaintiff admits the improbability of such a supposition; and, as fraud is not to be presumed, we cannot assume that there was a fraudulent packing and a concealment of defects. It was a fact well known to Megget & Bergerot, the brokers, to Holt & Arrowsmith, the agents of the plaintiffs, and to the defendants, that it was not usual for the Tennessee and North Alabama cottons to be uniform throughout the bale, and

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in all cases to conform to the sample in every respect. They all knew that different qualities of cotton were frequently to be found in the same bale; and the knowledge of this fact, generally known in the market, materially affected the price, and was taken into consideration in fixing it. The witnesses all say, that a risk was incurred in purchasing cotton grown in that part of the country; and that consequently, when cotton of different qualities is found in the same bale they are not disappointed, unless there is a great dissimilarity between the sample and the interior of the bale. To the plaintiffs and their brokers and agents in England this peculiarity in these cottons seems not to have been known; and, of course, when they saw that the cotton "*did not run regularly through the bale,*" they, at once, supposed it proceeded from fraudulent packing, and did not attribute it to the cause well known to their New Orleans agents, which knowledge had contributed to a reduction of the price. Some of the witnesses say, so strong is the prejudice against those cottons, that purchasers for the French market very seldom buy them. The knowledge which the agents of the plaintiffs had, of the known and general defects of the cotton purchased, is binding on them; and we do not consider it legal or just, after those agents have used that knowledge to reduce the price of the cotton, that the principals should set up their ignorance as constituting a claim for reducing it further. Independent of these grounds, the case of the plaintiffs is not presented in a manner free from suspicion. They kept this lot of cotton on hand three months after its arrival. When it was opened the price had declined about three farthings a pound, in the Liverpool market. The brokers fixed the rate of loss, or difference in value, precisely at that rate. They appear to us to have entered upon the examination of the cotton, with a predetermined belief or impression that it was falsely packed; and their object seems to us to have been rather to fix a scale for damages, than to ascertain first what was the true state of the case. They did not separate the good cotton from the bad, and could not tell any thing as to the proportions in each bale, or in the whole number of bales. As to the cotton which was passed by the brokers, they do not tell us

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of what quality it was, which we consider an important fact. The whole was sold as a "middling list of Alabamas," which was fixed by taking an average of the different qualities composing the lot; and Megget tells us, that it might well have been divided into three or four classes. There was, therefore, some cotton better than middling, and some inferior; and in fixing a scale for damages it was important to ascertain what the quantity of each was. The course pursued by the plaintiffs gave them the benefit of all the cotton that might be above middling, and would throw the loss on all below that quality on the defendants. In truth, if full effect be given to the course of the plaintiffs, and to their evidence, the sellers of cotton would be completely in the power of purchasers in foreign countries. Months after the cotton is in their ware-houses or mills, a charge is made of fraudulent packing. A survey, or examination is made by persons selected by the purchasers themselves, not under oath, and without notice to the party upon whom a claim is intended to be made. When that claim is made by suit, the selected witnesses are examined, a year or more after the survey, and as few particulars as possible given, by which the accuracy of the general result can be tested. When parties have such advantages, they must make out a clear case to entitle them to recover.

The testimony of Mure, shews that the plaintiffs did not pursue the course usual in Liverpool, for the purpose of ascertaining the loss. There, the spinner, or purchaser, when he discovers the fraud or defects in the cotton, either returns the whole bale, or when the quantity is not sufficient to authorize that, he returns the inferior cotton to the seller, and it is sold, and the difference made up by him.

There is a material difference between the facts of this case, and those of *Brown v. Duplantier*, 1 Mart., N. S., 312, and *Stiff v. Nugent &c.*, 5 Rob., 217, which we have particularly examined.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court be annulled and reversed, and ours is in favor of the defendants as in case of non-suit, with the costs in both courts.

Benjamin, for the plaintiff's.

P. Anderson and Grymes, for the appellants.

Commissioners of New Orleans Improvement & Banking Co. v. The Citizens Bank.

THE COMMISSIONERS OF THE NEW ORLEANS IMPROVEMENT AND BANKING COMPANY v. THE CITIZENS BANK OF LOUISIANA and others.

The agreement entered into by the Presidents of certain banks in New Orleans, on the 18th of August, 1841, for the purpose of guarantying the circulation of the banks represented by them, by which they bound themselves to contribute, in proportion to the circulation of each bank, as authorised by a resolution of the Presidents of the 6th April, 1840, for the relief of any one of the number which might be unable to pay or secure the checks drawn on it for the weekly balances, was founded on a good consideration, and is obligatory. The resolution created a several, not a joint obligation, each bank agreeing to contribute in the ratio of its circulation to that of the circulation of all the banks.

A joint obligation is created where several persons join in the same contract, to do the same thing (C. C. 2075), but a several obligation when what is promised by one of its obligors is not promised by the others, but each promises separately for himself to do a distinct thing. Such obligations, though contained in the same act, are as distinct, as if in different acts, made at different times. Ib. 2073.

A bank in liquidation under the act of 14th of March, 1842, cannot be sued before any other court than that under the direction of which it is being liquidated. Sec. 8.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

BULLARD, J. This is an action by the Commissioners appointed for the liquidation of the Improvement Bank against the other banks of this city, to recover from each its share of a check of upwards of ninety thousand dollars, drawn in favor of the Improvement Bank upon the Exchange Bank, by the settling clerk, under the authority of the league of bank Presidents. The plaintiffs allege that the several banks guaranteed the payment of said check, and became liable to pay in default of the debtor bank, in proportion to the circulation allowed to each bank, according to the scale established by the banks themselves, through the agency of their Presidents. The Parish Court dismissed the action as to such of the defendant institutions as were in liquidation, and gave judgment against the others, each for its virile share, in proportion to the number of banks which were parties to the contract; and two of the defendants, to wit, the City Bank, and the Carrollton Bank have appealed. The plaintiffs also appealed.

Our learned brother of the Parish Court has facetiously called

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the check, upon which this action is brought, the *caput mortuum* of the bank's chemical operations. It appears to have been the last check drawn by the secretary appointed by the presidents, for the purpose of adjusting balances, and giving checks on the debtor in favor of the creditor banks; and his testimony shows that a great number had been previously drawn, and that there was not a single bank in favor of which, and on which such checks had not been drawn and paid. They were always admitted by all the banks.

The resolution of the bank Presidents of the 18th of August 1841, which the plaintiffs allege as the basis of the liabilities of the defendants, respectively declares, that "the contribution to be made for any bank that may be unable to pay, or satisfactorily secure the check of the secretary for balances, shall be in proportion to the circulation authorized by the resolution of the 6th of April, 1840," (which was fixed with reference to the available means of the banks,) "and not in proportion to their respective capitals."

It is contended by the counsel for the defendants that this resolution is not binding on the banks; but we concur with the Parish Court in the opinion, that the evidence sufficiently shews the acquiescence of the banks, and that it became obligatory on such as assented to it. The league of bank Presidents grew out of the disordered condition of the currency, and the general suspension of specie payments. Each bank was interested in maintaining the circulation of all the others; and all had an interest in prompt payment of balances by such of the banks as should fall in arrears. The public looked to the agreement among the banks, by which the circulation of each was to a certain extent guaranteed, as its ultimate security; and the banks held out to the public, as the motive of their combination, the protection of the great interests of commerce and agriculture. The appellants certainly acquiesced in and acted under that system, and with reference to the resolution of the 18th of August, 1841.

But, we think, that resolution did not create a joint obligation. Each bank was at liberty to withdraw from the combination after each settling day; and the guarantee was not each

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for a fourteenth or a fifteenth according to the number of the banks, but it varied according to its circulation. The obligations contracted were, therefore, several, and not *joint*. Each bank agreed to contribute for any one bank not able to pay, or secure a balance found due on settlement, in the ratio which its circulation bore to the circulation of all the banks. The circulation of all the banks by the resolution of April 6th, 1840, was \$9,500,000; consequently, the proportion of the Carrollton Bank would be as \$300,000, and that of the City Bank as \$750,000 to that aggregate, which would make the Carrollton Bank liable only for 3-95ths, or about one thirtieth of the amount, and the City Bank for 75-950ths. The Code defines a joint obligation to be where several persons join in the same contract to do *the same thing*; but several obligations are produced, when what is promised by one of the obligors is not promised by the other, but each one promises separately for himself to do a distinct act. Such obligations, although they may be contained in the same act, are considered as much individual and distinct, as if they had been in different contracts, and made at different times. Civil Code, arts. 2073, 2075.

It follows from these principles, that the court did not err in proceeding to judgment against a part only of the original defendants, after sustaining the exception to its jurisdiction, as to those which were in the progress of liquidation under the statutes of 1842. But the court, in our opinion, did err in condemning each to pay its virile share according to the number of banks, instead of adjusting the amount of liability in proportion to the circulation of each, as settled among themselves. We do not see upon what ground the banks can now repudiate that contract. It was founded on a consideration of mutual support, and with a view of sustaining the circulation, which was common to them all, in the confidence of the public. It is true, the President of the bank, now plaintiff, voted against that resolution; but it is equally clear from the evidence, that he yielded to the will of the majority, and acted under it in receiving the large amount of Exchange bank notes, which must have been forced into circulation by the other Institutions, and equity forbids that she should be the only loser.

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No specific agreement as to interest is shown, and we think it should have been allowed from the day of protest, and not from the date of the check.

The judgment of the Parish Court, so far as it concerns the Carrollton and City Banks, is, therefore reversed; and it is adjudged and decreed, that the plaintiffs recover of the Carrollton Bank, the sum \$3171 23, with interest at five per cent, from the 19th of February, 1842; and of the City Bank, \$7928 13, with like interest until paid, and the costs of both courts; the costs of appeal, as to the Carrollton Bank only, to be paid by the plaintiffs.

Barker, Peyton and I. W. Smith, for the plaintiffs.

Micou and T. Slidell, contra.

SAME CASE—ON A RE-HEARING.

BULLARD, J. A re-hearing was allowed the plaintiffs, on the suggestion that we had overlooked a resolution, which provided that the checks drawn by the secretary on the debtor, in favor of the creditor banks, should bear interest at six per cent from date. Such an agreement has since been pointed out to us, and the judgment is to be corrected accordingly.

We are not dissatisfied with our former judgment upon the merits, so far as it relates to the liability of the banks under the resolutions of the Board of Presidents. With respect to the right of any of the defendants to discharge themselves, by an offset of debts due by the plaintiffs, it is a question not raised by the pleadings.

It is, therefore, ordered, that in lieu of five per cent interest, the plaintiffs recover at the rate of six per cent from the date of the check; and that, in all other respects, the judgment first pronounced, remain undisturbed.

 Stewart v. Pickard and others.

WILLIAM STEWART v. SARAH PICKARD and others.

The price of a slave who belonged to the husband before the marriage, but was sold by him during its existence, cannot be charged to the community, without proof that the price was employed for its benefit.

A partition having been ordered by the Probate Court, of the effects of the community previously existing between the plaintiff and his deceased wife, the former opposed its homologation, claiming to be allowed, as a charge against the community, the price of a slave sold by the father of certain minor heirs of the wife, more than ten years before, under a power of attorney from him, and which price he alleged had never been accounted for. *Per Curiam*: If the value of the slave was intended to be left as a donation in the hands of the person by whom it was sold, the donor cannot revoke it in this way; if as a loan, the action to recover it is prescribed.

The community of *acquêts* ceases to exist by the death of either spouse. A title to an undivided half of the property vests in the survivor and the heirs of the deceased; and if the former continue in the enjoyment of the common property, he will be bound by the obligations of a *negotiorum gestor*.

A Court of Probates has no jurisdiction of any matters in litigation between the surviving spouse and the heirs of the deceased, arising subsequently to the dissolution of the community—particularly of such as may result from the obligations of one of the parties as a *negotiorum gestor*.

APPEAL from the Court of Probates of East Feliciana, *Saunders, J.*

BULLARD, J. This case was before us in March, 1842. See 1 Robinson, 415.

In the further progress of the partition, the plaintiff claimed an allowance for the value of two slaves brought by him into the community, and sold by him during its existence; and further, that the heirs of W. W. Stewart should be charged with \$500, as the price of a slave, named Prince, belonging to the community, and sold by him, and for which he never accounted.

The heirs of the wife, on the other hand, present a claim against the plaintiff for the use of the land, for the years 1838 and 1839; for the use of their undivided half of the land since, for two years and four months; for the hire of eleven slaves, during five years, from 1838 to 1842, inclusive; for the use of the horses and farming utensils for the years 1838 and 1839; and for 25 bales of cotton on hand when the inventory was

taken, which the plaintiff made use of; the whole amounting to \$9230.

The Court of Probates rejected these claims on both sides, being of opinion that the community is not chargeable with the price of the two slaves, without proof that it was employed for the benefit of the community; that the claim against W. W. Stewart, was barred by prescription; and that the claims set up by the heirs were against the plaintiff as an individual, and not as a partner in the community, and could only be enforced in a court of ordinary jurisdiction. The correctness of this judgment is the question to be decided on this appeal.

We concur with the Court of Probates in the opinion, that the value of the two slaves sold by the plaintiff during the marriage, and which had belonged to him before, does not form a charge upon the community, without evidence that it was employed for the benefit of the community.

It is shown that a power of attorney was given in 1827, by W. Stewart to W. W. Stewart, to sell the slave Prince, the price of whom is now claimed of his representatives. If the value of the slave was intended to be left in the hands of W. W. Stewart as a donation, the donor cannot revoke it in this way, and its collation could only be claimed by the co-heirs of the donee. If it was intended as a loan, the action to recover it back was prescribed.

Nor did the court err, in our opinion, in refusing to enquire into the claim growing out of the rent of land, or the hire of slaves and stock, since the dissolution of the community, and in deciding that such claim, if any existed, could only be enforced in a court of ordinary jurisdiction. In the case of *Broussard v. Bernard et al.*, 7 La., 216, we held that the community ceased to exist at the death of one of the spouses, and the title to one undivided half of the property became vested in each of the parties, and that if the survivor continued in the enjoyment of the common property, he was bound by the obligations of a *negotiorum gestor*, unless he had some legal usufruct. That case was from the District Court, and the enquiry was gone into as to the revenues derived from the property after the dissolution of the community. The point now made, was considered by us in the

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case of *Babin v. Nolan*, 6 Robinson, 508, in which we held that the Court of Probates was without jurisdiction to try matters in litigation between the parties which may have arisen subsequently to the dissolution of the community, and particularly which may result from the obligations of one of the parties as a *negotiorum gestor*.

It is, therefore, adjudged and decreed, that the judgment of the Court of Probates be affirmed; and as both parties have appealed, it is further ordered that each pay one-half of the costs of the appeal.

Merrick, for the plaintiff.

Winter, contra.

 ANDREW M'COLLAM, v. THE POLICE JURY OF THE PARISH OF POINT
COUPEE.

Under the first section of the act of 22d March, 1843, where a party applies for an appeal, by motion in open court, at the same term at which the judgment appealed from was rendered, no citation, or other notice to the appellee, is necessary, but where the appeal is applied for at a subsequent term, citation is necessary, as the other party cannot be supposed to be then in attendance.

APPEAL from the District Court of Point Coupée, *Deblieux, J. Alsley and Stevens*, for the appellant. The motion to dismiss this appeal comes too late. The record was filed on the 5th of November, 1845, and the motion to dismiss on the 27th of January, 1846, the day on which the appellees fixed the case for trial. The motion should have been made at least three days before that on which the case was fixed for trial. 7 Mart., N. S., 265, 271, 2 La., 301.

Cooley, for the defendants. The appeal should be dismissed, on the grounds: 1st. That the record was not filed on the return day, nor within three judicial days thereafter; 2d. That the defendants have not been cited to answer.

MARTIN, J. The dismissal of this appeal is prayed for, on two grounds: the absence of citation, and the untimely filing of the transcript.

An appeal was prayed for during the term in which judgment

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was given, but no transcript was brought up at the term to which the appeal was returnable. Afterwards, consequently at another term than that in which the judgment was rendered, a second appeal, to wit, that now before us, was taken. No citation was served, or taken out on either appeal; and the appellant's counsel contends that none was necessary, the appeal not having been obtained on a petition *at chambers*, but in open court, under the act of March 22d, 1843.

It is true that if the first appeal had been brought up at the succeeding term of this court, no citation would have been necessary; because, under the act invoked, the appellees would have been bound to take notice of an appeal obtained during the term at which the judgment was rendered. But the appellant neglected to avail himself of his appeal; and, at the subsequent term of the District Court, moved for a new appeal, at a period when his adversaries cannot be supposed to have been in attendance, so as to take notice of the appellant's second application. A citation was necessary to afford them the opportunity of resisting the attempt to have the judgment altered.

The opinion which we have expressed on the first ground for a dismissal, renders it unnecessary to act on the second.

Appeal dismissed.

VIRGINIE KNAPS v. AUGUSTE GRAUGNARD.

Plaintiff, who had been divorced, for adultery, from her former husband, and married her paramour in another State, where such marriages are not, as here, forbidden by law, sued her first husband for the property she had brought into marriage, without being authorized or assisted by her present husband. On an exception to her want of authorization, after her second marriage had been proved, she offered in evidence the record of the suit of her first husband against her, and her conviction of adultery, to prove that she could not legally contract a second marriage. *Held*, that the proof of the second marriage, given in support of the exception, is sufficient to show that she is under marital authority, and that she cannot be listened to in alleging her incapacity to contract such a marriage here, resulting from her own violation of law.

APPEAL from the District Court of Pointe Coupée, *Nicholls, J. Beatty*, for the plaintiff.

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S. L. Johnson, for the appellant. The second marriage, though any ground should exist to annul it, must be held valid until the nullity is established by a judgment of a competent court, in a direct action. The validity of a marriage is to be determined by the law of the place where it was celebrated. If valid there, it is valid every where. Stephen's *Nisi Prius*, 18, *note a*. Even when the parties go into a foreign state to evade the laws of their own, the marriage will be valid in the place where the parties live. *Medway v. Needham*, 16 Mass., 159. Under any view of the law, the second marriage, subjected the wife to the disability of being unable to sue without the authorization of the husband.

BULLARD, J. The plaintiff having been divorced from her first husband, the present defendant, on the ground of adultery committed with one Henry Knaps, afterwards intermarried with her paramour in the State of Mississippi, where such a marriage is not forbidden by law, although it is so in this State. She afterwards instituted the present action against her former husband, to recover the property she had brought into marriage, without being assisted or authorized by her present husband in the proceeding. This was excepted to by the defendant, but judgment having been rendered against him, on the merits, he prosecutes this appeal.

On the trial of the exception, after her marriage in Mississippi had been proved, it appears the plaintiff offered in evidence the record of the suit of her former husband against her for a divorce, and her conviction of adultery with Knaps, with a view of showing that she could not validly contract marriage with him, and, consequently, that his authorization to sue is not required. Its introduction by her, for that purpose, was objected to, on the ground that she ought not to be allowed to allege her own turpitude, but it was admitted by the court, and a bill of exceptions taken.

We are of opinion, that the court erred in admitting the proof offered by her, to show her incapacity to contract her second marriage on the ground of adultery. *Allegans turpitudinem suam non est audienda*. The proof of her marriage in Mississippi, given by the defendant in support of his exception, must

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be considered sufficient to show that she is under marital authority, and she cannot be permitted to gainsay it, by alleging an incapacity to contract such marriage in Louisiana, resulting from her own violation of its laws. So far as it concerns any advantage to herself, she cannot be listened to by the courts of this State, in relation to a contract reprobated by our laws, whatever may be our opinion of the matter as to other persons, whose rights here might depend upon the validity of a marriage contracted in another State, where it is not forbidden, though evidently in evasion of our own prohibitory laws.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, that the exception be sustained, and the suit dismissed, with costs in both courts.

SAMUEL L. BUSH v. WILLIAM G. WRIGHT and others.

One who receives a note, with knowledge of an agreement between the original holder and the endorsers, that but one-fifth of the amount should be paid at maturity, a new note being given for the balance, will be bound by the stipulation.

APPEAL from the District Court of St. Helena, *Jones, J.*

BULLARD, J. This is an action by the endorsee, against the drawer and endorsers of a promissory note, for four hundred dollars, with interest at ten per cent a year from maturity till paid, and payable at the branch of the Bank of Louisiana at Baton Rouge, twelve months after date.

The endorsers pleaded, that they endorsed upon condition that the note should be made payable at the bank, and that the drawer and endorsers should be at liberty to pay by installments of one-fifth, according to the usage in bank. That accordingly, when the note was about falling due, a new note was offered, at the elected domicil, for the amount less \$100; the original note, of which this is a renewal, being for \$499 25, which was left with the cashier of the bank, together with the money for the curtailment. That the money and the new note remained in the hands of the cashier for thirty days, and was finally returned, having been refused by the holder of the note.

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The statement of facts shows that Amos Kent, one of the original holders of the note, testified on the trial, that the note was given on the conditions set forth in the answer, and that it was transferred to the plaintiff with a full knowledge of that fact. The cashier of the bank, where the note was made payable, testified, that Wright, the drawer, on or about the 31st of December, 1840, deposited in his hands one hundred dollars in cash, and a note made by him for \$300, he thinks payable at the same bank in twelve months, and requested him to offer the same to the holder of a note drawn by him for \$400, to be due in a few days, as payment thereof; that he refused to receive the same as cashier of the bank, but, as an individual, and to accommodate him, he did receive the money and note, and on the same day, after Wright went away, offered the same in payment of the note of \$400, which, being refused by the holder as payment, was afterwards, on the 4th of February, returned to Wright. He farther testifies that the note never was placed in bank for collection, and had not been discounted, and, consequently, could not be renewed without special instructions. The same facts are, in substance, sworn to by F. M. Kent. It is further shown, that the note was protested at its maturity, and notice given to the endorsers.

There was a verdict and judgment for the defendants, and the plaintiff appealed.

The defendants did not annex to their answer the note thus offered in renewal, according to the alleged contract, nor did they deposit in court, subject to its order, the sum of one hundred dollars, of which they allege a tender to the holder of the note. The consequence is, that, by the judgment rendered, the plaintiff loses the benefit of both contracts, and does not recover even what would have been due to him under the second agreement, as alleged by the defendants. There does not appear to be any good legal reason why he should be barred from recovering any thing. Under these circumstances, we think, justice requires that the case should be remanded for a new trial,

It is therefore ordered, and decreed that the judgment of the District Court be reversed, the verdict set aside, and the case

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remanded for a new trial ; and that the defendants pay the costs of the appeal.

Brunot, for the appellant.

Davidson, for the defendants.

VILLENEUVE LE BLANC V. THE PARISH OF EAST BATON ROUGE.

The holder of a warrant, drawn by the auditor on the treasurer of a parish, for a certain sum, cannot assign a part of it, without the consent of the parish authorities. The latter are not bound to pay their debts by portions ; nor will they be bound, though a draft for the part assigned was accepted by the treasurer, if he was not authorized to do so.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

Brunot, for the appellant.

Elam, for the defendants.

MORPHY, J. The plaintiff has taken this appeal from a judgment rejecting a claim of \$305 50, he makes against the defendants, on a draft of one Thomas Wilkins for a larger sum in his favor, drawn upon and accepted by A. Duplantier, their treasurer, this draft having been given to him by Wilkins, for lumber furnished to the latter, to be used in the construction of a parish jail. The defence below was, that the defendants are in no way liable to the plaintiff, Thomas Wilkins having no authority to draw, nor A. Duplantier any to accept the drafts, so as to bind the parish for the payment thereof, and that all demands that Wilkins ever had against the parish of East Baton Rouge, were evidenced by warrants drawn by the auditor of the parish, in favor of said Wilkins, which have long since been paid.

The evidence shows that Thomas Wilkins, who contracted to build for the defendants a parish jail, received as the work progressed, warrants drawn by the auditor of the parish upon the treasurer, and that the latter was instructed by the Police Jury to pay no accounts against the parish, except on the warrant of the auditor ; that, at the date of the draft sued on, Wilkins held a warrant, signed by the auditor, for \$1500, and drew on ac-

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count of it not only the draft, the balance of which is claimed, but also a number of other drafts, amounting together to \$1740, or thereabouts, which were accepted, but not paid by the treasurer. It is clear that these acceptances are not binding upon the parish; the province of the treasurer being only to pay such sums as he is directed to pay. He was without authority to accept drafts drawn upon him as treasurer, by real or pretended creditors of the parish. The payment of \$100 made by Duplantier on account of the draft, which was originally for \$450 50, is a personal matter between him and Wilkins, for whose accommodation it was made. It was unauthorized by the defendants, who are yet liable for the warrant of \$1500, held by Wilkins, if it has not been paid. They are not bound to pay their debt to Wilkins by portions; and no partial assignment of it could be made to the plaintiff, without their consent. 8 La., 536. 3 Rob., 432.

Judgment affirmed.

THE BANK OF LOUISIANA V. JAMES M. ELAM.

The insertion of the title of the suit in any part of the citation served on the defendant, in such a manner as to preclude any mistake, is a sufficient compliance with art. 179 of the Code of Practice, which does not prescribe that the title shall be inserted in any particular part of the citation.

The return of a sheriff stating the manner in which a citation was served, cannot be contradicted by evidence where that officer has not been called on to correct it.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

Brunot, for the plaintiffs.

Elam, appellant, *pro se*.

MARTIN, J. The defendant is appellant from a judgment against him, as endorser of two notes. He has put the case before us on an assignment of error, to wit, the absence in the copy of the original citation served on him, of the title of the cause; and he complains that the court overruled his exception on that ground. He has referred us to the Code of Practice,

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art. 179, which expressly requires the insertion of the title of the suit in the citation, and he has produced a witness, who testifies to a copy of the citation and petition left at the defendant's house by the sheriff. In the copy of the citation, the title of the suit is not stated.

The sheriff's return informs us, that in the original citation the title of the cause was stated, after the signature of the clerk; *id est*, this appears from the copy of the original that comes up with the record, of which he states that he served a true copy.

The inspection of the citation does not enable us to ascertain whether the title of the suit was written on the face of the citation, or on the back thereof. It is, however, clear, that the title of the suit was written on the citation, in such a manner as to leave no doubt that the suit in which the defendant was cited was intended, so as to prevent any mistake. The citation expressly refers to the copy of the petition accompanying it, in which the name of the parties and the title of the suit were stated. Admitting that this does not suffice, and that the Code expressly requires the use of sacramental words in the citation which cannot be dispensed with, and to which no others can be substituted, as the Code has said nothing as to the part of the citation in which the sacramental words must be inserted, it will suffice that they should be thereon in such a manner as to preclude any mistake.

The return of the sheriff that he served a true copy of the original citation, cannot be contradicted by testimony. If the defendant believed the sheriff's return was incorrect, he might have called on that officer for the amendment of it.

Judgment affirmed.

AMELINA GIL v. WILLIAM GIL, Her Husband, and others.

Neither a married woman, though entitled, in virtue of her general mortgage on the property of her husband, to be paid out of the proceeds in preference to any subsequent creditor, nor any mortgage or other creditor, can arrest the sale of property seized under execution, on the mere ground of having a preference upon its proceeds. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, and may claim to have the effect of the seizure regulated as it relates to him, when he asserts a preference on the proceeds of the things seized and sold; and the court may order the amount to be retained by the sheriff, subject to its order. In such a case the sheriff may be enjoined from paying the proceeds to the seizing creditor.

The 6th sec. of art. 298 of the Code of Practice was intended to enable the wife to prevent the husband, pending a suit for a separation of property, from disposing of the property held in community, or on which she has a privilege for her dotal rights, to her prejudice. In such a case she may obtain an injunction against her husband; but, with regard to his creditors, her remedy, when she seeks only to exercise a right of preference, is pointed out by art. 300 of the same Code, and those under which her third opposition should be conducted.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

Elam, for the appellant.

G. S. Lacey, for the defendants.

SIMON, J. This is an action instituted by a married woman against her husband, for a separation of property. She prays, in her petition, that judgment be rendered in her favor against her said husband, for the sum of \$5000, as the amount of her dowry, with a decree recognizing her legal mortgage on the property described in the petition, to take effect from the 10th of December, 1828, (the date of the marriage contract); and that an injunction may be ordered, restraining the sheriff and her husband's seizing creditors from any further proceedings in the sale of the property by them seized, until the further order of the court; that they be cited accordingly; and that the injunction be made perpetual, &c.

The writ of injunction was issued, whereupon the creditors filed their written motion to dissolve it, with interest and damages, averring that, by her own showing, admitting the facts stated by her to be true, she has no right to enjoin the sale of the property seized by the respondents.

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On this motion a judgment was rendered by the court *a qua*, dissolving the injunction complained of; and further ordering, that the proceeds of the sale mentioned in the plaintiff's petition, be retained in the hands of the sheriff, until further order; and from this judgment, after a vain attempt to obtain a new trial, the plaintiff has appealed.

This case cannot be distinguished from those of *Vanlille v. Her Husband et al.*, and *Flaujac v. Her Husband et al.*, reported in 5 Rob., 496, 498, in which, recognizing the principle, that a married woman who has a general mortgage upon the property of her husband would have a right to be paid out of the proceeds of the sale thereof, in preference to any other subsequent creditor, we held, "that under arts. 396, 401, and 403 of the Code of Practice, a third person may make opposition to the price being paid over to the seizing creditor, and may claim to regulate the effect of the seizure in what relates to him, when he contends that he has a right of preference on the proceeds of the thing seized and sold." We said, "that in such a case, the court may direct the sheriff to retain in his hands, subject to its further order, the proceeds of the sale; but that the law has nowhere permitted a mortgage creditor, or any other, to arrest the sale of the property seized, when the opposition is founded upon a mere right of preference upon its proceeds." See also the Code of Practice, art. 300, which provides that, in such cases, the sheriff may be enjoined from paying to the seizing creditor the proceeds of the property seized, &c. We have been unable to discover any reason to be dissatisfied with our former decisions; nor can we agree with the appellant's counsel, in his position, that the injunction sued out in this case was properly granted under sec. 6 of art. 298 of the Code of Practice, which he invokes. This article provides for a different class of cases, and has for its object to enable the wife to prevent the husband, during the pendency of the suit for a separation of property, from disposing, to her prejudice, of the property either held in community, or on which she has a privilege for her dotal rights. In such cases she is entitled to obtain a writ of injunction against her husband; but with regard to his creditors, her remedy, when she seeks only to exercise a right of preference, is

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pointed out by art. 300, already quoted, and those under which her third opposition should be conducted and regulated.

Judgment affirmed.

ISAAC H. WRIGHT V. LAWSON HIGGINBOTHAM.

Irregularities arising subsequent to a judicial sale, such as an irregularity in taking the bond of a purchaser, etc., cannot affect the rights acquired under the sale. But where the subsequent irregularity is rather a continuation of one existing previous to the adjudication, or has been caused by an irregularity in the proceedings previous to the sale, as where the advertisement of a sale at twelve months' credit does not state that the bond is to bear interest from the day of the adjudication at the rate allowed by the judgment, as required by art. 681 of the Code of Practice, and the bond consequently is not taken so as to bear the interest allowed by the judgment on which the execution was issued, the rule that, under a forced alienation of property the purchaser will acquire no title unless the formalities of the law be strictly complied with, applies, and the sale will be invalid.

APPEAL from the District Court of St. Helena, *Jones, J.*

Lawson, for the appellant.

Merrick, for the defendant. The judgment below should be affirmed. The bond not corresponding with the judgment, the sale was null. Code of Practice, art. 681. *Rice v. Schmidt*. 11 La., 71. The price paid was not a serious one. Pothier, Vents, p. 10, No. 19.

SIMON, J. This is an action of revendication, instituted by the purchaser of property at a sheriff's sale. He represents that an execution having issued against the defendant, by virtue of a judgment obtained against him, the same was levied upon a tract of land containing four hundred acres, and that after due proceedings had on the said execution, the aforesaid tract of land not having brought two-thirds of its appraisement at the cash sale, the same was readvertised to be sold at twelve months' credit, when, on the 4th of June, 1842, it was adjudicated by the sheriff to him (the petitioner), who gave his twelve months' bond for the purchase price with good security, and who, since that time, has satisfied said bond by paying the same. He further states that he is the legal owner of the said

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property, but that the defendant, ever since the sale, has held and retained the possession thereof, notwithstanding he has been legally divested of his title thereto ; and that the defendant is bound to account to him for the rent of the said tract, which he, plaintiff, estimates at the sum of \$200, for the time that he has been deprived of the possession of the property. He prays for a writ of possession, and for judgment against the defendant, for the rent, &c.

The answer of the defendant expressly denies his having been legally divested of his title to the tract of land described in the petition, and avers that the formalities of law have not been complied with. He farther alleges that the pretended twelve months' bond did not bear interest, although the judgment under which it was given bears interest at the rate of ten per cent per annum ; and he prays that the plaintiff's demand be rejected.

Judgment was rendered below in favor of the defendant, setting aside the sale declared upon in the plaintiff's petition ; and from this judgment, after a vain attempt to obtain a new trial, the plaintiff has appealed.

The record contains the judgment on which a writ of *fi. fa.* was issued against the defendant, and all the proceedings had thereon, from the time said execution came into the hands of the sheriff. It appears thereby that the execution was levied on the tract of land claimed by the plaintiff, that due notice thereof was given to the defendant, and that the sale was advertised for cash, to take place on the 7th of May, 1842 ; that on that day, the property was regularly appraised at the sum of \$3000, but that after having been offered for sale, no bid having been made to two-thirds of its appraisement, the sale thereof was postponed until the 4th of June following, then to be made at twelve months' credit to the last and highest bidder. The advertisement of this last sale, after giving a description of the property, recites that the terms of sale will be : "*a credit of twelve months, the purchaser to give bond and approved personal security, and a mortgage retained on the property sold.*" On the day of the sale, after the reading of the certificate showing all the mortgages existing on the property, which mortgages consist in a

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number of judicial mortgages to a large amount, the same was adjudicated to the plaintiff for the sum of *five dollars and fifty cents*, for which he furnished his bond with security, payable one year after date, without interest.

We concur with the judge *a quo* in the opinion, that the proceedings had previous to the adjudication are all regular, except that part which relates to the publication of the conditions on which the last sale is to be made, and to the bond taken by the sheriff in conformity with the advertisement. We are not ready to say that the taking of an irregular bond, which is a proceeding subsequent to the adjudication, can affect the rights of the purchaser. On the contrary, it is well settled in our jurisprudence, that irregularities arising subsequent to the sale, cannot affect the rights acquired under it. 3 Mart. N. S. 489. But when the subsequent irregularity is rather a continuation of one existing previous to the adjudication, or, in other words, has been caused by an irregularity in the proceedings previous to the sale, we think that the rule that, "under a forced alienation of property the purchaser will acquire no title, unless the formalities of the law be strictly complied with," fairly applies, and that such sale cannot be considered as a valid one. 4 Mart. 513. 11 Ib. 609, 711. 3 La. 421.

Here, the advertisement of the sale at twelve months' credit, does not state that the bond shall bear interest from the day of the adjudication, at the same rate as that allowed by the judgment, and this formality is expressly required by art. 681 of the Code of Practice, which is in these words: "The sheriff, on giving notice of the place, day and hour of this new crying, must announce that it will be made at twelve months' credit, the purchaser being required to furnish good and sufficient security, and special mortgage on the thing sold, *bearing interest from the day of the adjudication, at the same rate as that allowed by the judgment.*" This provision of the law was not complied with, and it is obvious that this is the reason why the bond furnished by the plaintiff does not bear the interest of ten per cent, allowed by the judgment on which the execution had issued. This, it seems to us, is a fatal objection to the validity of the sale under consideration.

Judgment affirmed.

JOHN MORRIS v. CONSTANCE TERRENOIRE.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

MARTIN, J. The defendant is appellant from a judgment which condemns her to transfer two certain lots to the plaintiff, or to pay the value thereof, on receiving a re-conveyance of two others.

The parties entered into a contract, by which the plaintiff transferred to the defendant a lot in the Third Municipality of the city of New Orleans, in exchange for five others in the town of Baton Rouge, transferred to him by the defendant. The plaintiff charges that the defendant fraudulently deceived him and the notary, in giving the description of two of the lots contracted for.

The court was of opinion, that the evidence shows that the plaintiff contracted for, and was induced to believe he had acquired a title to two lots other than two of those which were transferred to him; and concluded that, his error falling on the substance of the thing, he was entitled to relief.

The error of the plaintiff might induce the court to declare that he did not enter into any contract. *Non videtur qui errat consentire.* It could not authorize the court to substitute another contract to that which the parties had made. A close examination of the evidence has left us under the impression, that nothing sustained the charge of fraud against the defendant. The person on whose description the notary and the plaintiff acted in the confection of the deed, does not appear to have been authorized to represent the defendant. Neither can we concur in the opinion of the judge, that there was error on the part of the plaintiff. This appears to us doubtful; and justice seems to demand that he should be afforded the opportunity of adducing further proof.

It is, therefore, ordered that the judgment be annulled and reversed, and the case remanded for a new trial; the plaintiff and appellee paying the costs of the appeal.

Elam, for the plaintiff.

G. S. Lacey, for the appellant.

Chapman, Administrator v. Hardesty, Executor, and others.

JAMES CHAPMAN, Administrator of the Succession of Joseph Fuqua, deceased, v. FRANKLIN HARDESTY, Dative Testamentary Executor of Warren C. Whitaker, and others.

Plaintiff's intestate, as assignee of a judgment against four parties, agreed to accept from two of the debtors a title to a tract of land in satisfaction thereof, and gave a receipt on the *fi. fa.* issued on the judgment for its amount in full. The act of sale was prepared and signed by one of the two debtors, but the other died before executing it, and before he had been put in default, and his executor offered to complete the act. In an action to cancel the receipt: *Held*, that by signing the receipt on the *fi. fa.* plaintiff's intestate abandoned his rights thereunder, reserving only what he acquired against the two debtors who contracted to give the title to the land; that one having complied with his obligation, and the other dying without having been put in *mora*, the contract with them cannot be abandoned, and the obligation of the others revived. Judgment in favor of defendants as in case of non suit.

APPEAL from the District Court of East Feliciana, *Johnson, J. Lawson*, for the appellant.

Dunn and McVea, for the defendants.

MARTIN, J. The plaintiff states, that J. C. Chapman having obtained a judgment against Marks, Whitaker, Terrell and McKneely, transferred it to Fuqua, whose succession he represents, in payment for a negro slave; that Marks and Whitaker agreed to transfer a tract of land to Fuqua, in discharge of the said judgment; that accordingly Fuqua acknowledged the receipt of the amount of the judgment on a writ of *fi. fa.* issued thereon, in the expectation of the title to the land, which was never executed; that Whitaker died, and Hardesty has been appointed his dative testamentary executor; that Marks has made a cession of goods, and Terrell has been appointed his syndic; that McKneely has also died, and his brother is administrator of his estate; and that Terrell has removed out of the jurisdiction of the court. The petition concludes with a prayer, that the administrators of the two deceased, and the syndic of the insolvent be cited, and that, contradictorily with them, the plaintiff as administrator of Fuqua, may have a judgment decreeing that the receipt on the back of the *fi. fa.*, be cancelled and annulled.

The defendants pleaded, that as far as the transfer of the land which Whitaker and Marks agreed to make to Fuqua is con-

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cerned, Hardesty, as executor of Whitaker, is ready to comply therewith on the part of the deceased, and that the transfer has already been signed by Marks.

There was a judgment in favor of the defendants as in case of non suit, and the plaintiff appealed.

The record shows, that Marks, Whitaker and Fuqua requested to have the deed prepared; that it was prepared, but that Whitaker went away in the mean while, promising to return and sign the deed, but did not do so; that it was executed by Marks only; that the consideration for Fuqua's receipt on the *fi. fa.*, was the undertaking of Marks and Whitaker to transfer the land; and that Fuqua had the control of the execution, and was the owner of the judgment.

It does not appear to us that the court erred. Fuqua, by his receipt on the *fi. fa.*, abandoned his rights thereon, reserving to himself nothing but those which he had acquired against Marks and Whitaker. Marks complied with his obligation, and Whitaker died without having been put *in mora*. The plaintiff cannot be permitted to abandon his contract with two of the defendants, and revive the obligation of the two others.

Judgment affirmed.

 CHARLOTTE BREED v. JOSEPH S. R. GUAY.

Defendant having pleaded in reconvention that the plaintiff was indebted to him in a certain sum, as the price of a house and lot, which he had, at her instance, purchased for her, offered the testimony of witnesses to establish those allegations. *Held*, that the evidence being parol, and tending to establish an agency to purchase real estate, was inadmissible.

APPEAL from the District Court of East Feliciana, *Johnson, J. Lawson*, for the plaintiff. Parol evidence is inadmissible to prove an agency to purchase real estate. *Muggah v. Greig*, 2 La., 595. *Badon v. Badon*, 4 La., 168. Or the sale of it. Civil Code, art. 2255. *Roper's Heirs v. Yocum*, 3 Mart., 424. *Grafton v. Fletcher*, Ib. 486. *Nichols v. Roland*, 11 Mart., 190. *McDonough v. Hart et al.* 3 La., 458. Or to prove warranty.

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Watkins v. McDonough, 2 Mart., 154. Or to destroy title to real estate. *Duncan v. Cevallo's Ex'rs.*, 4 Mart., 571. *Chabot, et al. v. Blanc*, 5 Mart., 328.

Lyons, for the appellant. Though parol evidence of an agency to buy real property cannot be received to make or destroy title to real property, it may be to establish collateral facts, as the payment of money at the special instance of a party, for her use, in the purchase of real estate. 3 La., 164. 7 Ib., 318, 331. 8 Ib., 296. 17 Ib., 303. 18 Ib., 348.

MORPHY, J. The defendant, sued as the maker of a promissory note for \$600, payable to the order of the plaintiff, pleads in compensation and reconvention, that she is indebted to him in the sum of eight hundred dollars, and claims the difference. He alleges that the plaintiff, being desirous to purchase a house and lot in Clinton, authorized and requested him to bid for her to the amount of eight hundred dollars at a sheriff's sale, and, if the property was knocked off for that amount, to take the title in his own name, and afterwards to convey the same to her; that he accordingly did attend the sheriff's sale, bought the house and lot for eight hundred dollars, which he paid, and took the adjudication in his own name; that soon afterwards he offered to convey the property to the plaintiff, but that she, having changed her mind, refused to receive the conveyance, and reimburse the eight hundred dollars thus advanced for her. There was a judgment below in favor of the plaintiff, and the defendant appealed.

Several witnesses having been offered on the trial to prove the facts alleged in support of the demand in reconvention, the judge below refused to receive their testimony, being of opinion that it was an attempt to prove by parol an agency to purchase real estate. It is urged that there is error in this opinion of the judge; that, although it be true that parol proof of an agency to buy real property cannot be received to *make* or *destroy* title to that species of property, yet that it should be received to establish *collateral facts* in relation to it, such as the payment of a sum of money, made at the special instance and request of the party, in consequence of an authority to purchase. The judge, in our opinion, did not err. The fact sought

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to be established was not a collateral one, but the agency itself, without the proof of which the defendant can have no claim against the plaintiff, in consequence of his bid at the sheriff's sale. The attempt is to force a title upon the plaintiff in order to recover eight hundred dollars, or to compel her to submit to the loss of that sum unless she receives the title tendered to her. The testimony goes to establish an agency to purchase real estate, and is inadmissible under the repeated adjudications of this court. 2 La. 596. 4 La. 168.

Judgment affirmed.

THE NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY v.
CYRUS RATLIFF and others.

Where a notice of protest to an endorser of a note, deposited in a post office in the parish of his residence, is addressed to him in that parish, *via* a post office in an adjoining parish, the latter being the nearest to his residence, the insertion of the word *via* will not render the notice bad. *Per Curiam*: The word *via* does not necessarily raise the presumption that the notice was forwarded to another office than that, to the name of which it was prefixed. It was, doubtless, intended as a direction to the post master at the office in which the notice was deposited, to send it to the party through the office to which it was prefixed, which was the nearest to his residence, though out of the parish; and as the post master at the latter place could not send it to any office nearer to his residence, the probability is that he kept it, according to the evident intention of the writer.

APPEAL from the District Court of West Feliciana, *Johnson, J. Phillips*, for the appellants.

Paterson, contra, cited Bull. & Curry's Dig., p. 41, § 5; p. 43, § I and II. 5 La. 265. 16 La. 20, 283, 310.

MORPHY, J. This action is brought upon a promissory note, for \$800, drawn by Cyrus Ratliff, and endorsed by H. Perkins and Robert J. Barrow, dated the 15th of December, 1841, and made payable at the office of the Carrollton Bank at Bayou Sara, twelve months after date. There was a judgment below against the maker and the first endorser, and one as in case of

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non suit in favor of the other endorser. The plaintiffs appealed.*

The record shows that the note was duly protested for non-payment, and that, on the day of the protest, the notary put into the St. Francisville post office, at Bayou Sara, three notices, addressed to Robert J. Barrow: one to him at "*Bayou Sara, West Feliciana, Louisiana;*" one to him at "*Laurel Hill post office, West Feliciana, Louisiana;*" and one to him at "*West Feliciana, Louisiana via Pinckneyville, Wilkinson County, Mississippi.*" The Pinckneyville post office is shown to be the nearest to the residence of the defendant, the Laurel Hill post office is about two miles and a half farther, and the Bayou Sara, or St. Francisville post office is the most distant of the three.

It is urged in support of the judgment appealed from, that notice of the protest was not sent to the nearest post office to the defendant's residence, as that which went to the Pinckneyville post office, which is the nearest, was addressed to him *via* that office; that, with such a direction, the post master at Pinckneyville, had no right to stop the notice at his office, and that it cannot be presumed that he did; and that if the notice was kept there, it was incumbent on the plaintiffs to show it, which they have not done. The word *via*, used in the address of the letter, does not, we think, necessarily raise the presumption, in this case, that the notice was forwarded to another place, and did not remain at the Pinckneyville post office, through which it was addressed to Robert J. Barrow, who resided, probably to the knowledge of the post master, in the immediate neighborhood. It is more reasonable to suppose, that the post master kept the notice at the disposal of the person to whom it was addressed, than that he sent it back to the place from which it came, or to some other post office in West Feliciana. The word *via* was no doubt a direction to the post master at Bayou Sara, who received the letter, to send it to the defendant through the Pinckneyville office, which was known to be the nearest to his residence,

* This appeal was intended to be taken only from the judgment in favor of Barrow as in case of a non suit.

 Whittemore v. Watts, Sheriff.

though out of his parish, and in a different State. As the post master at Pinckneyville could not send the notice to any other office nearer to the defendant than his, the greater probability is, that he kept it, according to the evident intention of the notary to forward the notice as near to the defendant's residence as he could. Where the mail goes by land from one point to another, it is unnecessary and unusual to point out in the address of a letter, the intermediate places, or post offices through which it is to pass. The place of destination is alone mentioned, and it is left to the post master to forward letters as he thinks most proper. In the present case, the notice having been placed in the post office at Bayou Sara, in West Feliciana, addressed to the defendant living in the same parish, the only possible object of the notary, in directing it as he did, must have been to forward it to the endorser at the place nearest to his residence. The post master at Pinckneyville no doubt so understood it, and acted accordingly. We think that the defendant is bound by the notice, and that the plaintiffs are entitled to recover.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that the plaintiffs recover of the defendant Robert J. Barrow, the sum of \$800, with interest thereon at the rate of eight per cent per annum, from the 17th of December, 1842, until paid ; \$5 costs of protest, and the costs in both courts.

 ELIZA R. WHITTEMORE v. JACOB J. WATTS, Sheriff.

Section 3 of the act of 25 March, 1831, and section 3 of the act of 29 March, 1833, do not authorize the court, on the dissolution of an injunction, to increase the interest, where the original judgment bears interest at ten per cent a year. This principle applies with greater force, where the party enjoining is not the debtor. Whatever else it may be proper to allow, must be in the form of damages.

APPEAL from the District Court of Livingston, *Jones, J.*

Watterston and Greiner, for the plaintiff.

Hoffman, for the appellants.

BULLARD, J. The plaintiff sued out an injunction against the sheriff, to stay proceedings under a writ of *feri facias* against

The Bank of Louisiana v. Holmes.

the property of her husband. The suing creditors intervened, and moved to dissolve the injunction for want of equity on the face of the proceedings. Their motion was sustained, the injunction was dissolved, and the plaintiff and her surety condemned to pay one per cent damages on the judgment, amounting to about \$19,000, and \$100 special damages. No interest was allowed, and the judge gives as his reason for refusing it, that the judgment already bears interest at ten per cent.

Both parties appear to acquiesce in the judgment so far as it pronounces the dissolution of the injunction; but the creditors have appealed and complained, that interest ought to have been allowed them, as well as damages, under the acts of 1831 and 1833.

The judgment is in harmony with the view we took of these statutes in reference to interest, in the case of *Dabbs v. Hemken*, 3 Rob., 123. The principle applies with greater force when the party enjoining is not the debtor himself. The injunction having been dissolved on motion, without any enquiry into the merits, we cannot enquire into any consequential damages resulting from the proceedings of the plaintiff herself, as a creditor of her husband, pending the injunction, as complained of by the appellants.

Judgment affirmed.

THE BANK OF LOUISIANA v. JAMES HOLMES.

Proof that the endorser of a note, who had been discharged by illegality in the protest, subsequently solicited and obtained indulgence from the holders, will not render him liable, unless it be also shown that he was aware, at the time of the application, of the circumstance which liberated him.

APPEAL by the plaintiffs, from a judgment against them as in case of a non suit, rendered by the District Court of East Feliciana, *Johnson, J.*

Bowman, for the appellants, cited 13 La. 368. Chitty on Bills, 373. Ed. 1836.

Merrick, for the defendant. The burden of proving that the

The State v. Hébert and another.

defendant knew of his discharge at the time he asked for indulgence, is upon the plaintiffs. 12 La. 465. 13 La. 421. 2 Rob. 158. Story on Bills, No. 320.

Lawson, on the same side, cited 8 Mart. 147. 11 La. 17.

MARTIN, J. The bank is appellant from a judgment refusing to declare the liability of the defendant, as endorser of a note, in consequence of the absence of a legal protest. The counsel of the bank does not pretend that there was a legal protest; but contends that the liability of the defendant results from his having solicited and obtained indulgence from the bank. This would be true, if knowledge of the defendant's having been discharged, by the informality of the protest, at the time he solicited indulgence, could be shown. But in the absence of any proof of his knowledge of the circumstance which liberated him, the claim of the bank on him, cannot be sustained. 12 La. 465. 13 La. 421. 2 Rob. 158. Story on Bills, No. 320.

Judgment affirmé!

THE STATE v. ACHILLE HEBERT and another.

A parish judge or justice of the peace before whom a party is brought for examination, cannot admit him to bail, if the crime of which he is accused be "punishable with death, or with seven years or more imprisonment at hard labor." Act 3 May, 1805, sec. 13.

A bail bond taken by a magistrate in a case in which he is prohibited by law from admitting the party to bail, is void; and the State cannot recover on it.

APPEAL from the District Court of East Baton Rouge, *Johnson, J. Read*, District Attorney, for the State.

Avery and Elam, for the appellants.

MARTIN, J. The defendants, subscribers to a bail bond in a State prosecution for burglary, complain that the District Court erred in sustaining the claim of the State, the bond having been taken by a justice of the peace, in violation of the act of the legislature of the 31st of March, 1807, which prohibits parish judges and justices of the peace from receiving bail in cases of offences punishable with death, or with seven years, or more imprisonment

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at hard labor. Bull. & Curry's Dig. 530. By statute, (Bull. & Curry's Dig. p. 242, sec. 6, and p. 261, sec. 100,) burglary is punishable with over seven years imprisonment. The appellants' counsel, therefore, contends, that the justice of the peace was without authority to bail—consequently, to take the bond, which, *ergo*, is null. That it is true that the offence charged was, according to the Constitution, aailable one, and that the legislature could not prevent persons charged therewith from being admitted to bail; but that the constitution is perfectly silent as to the magistrate, or officer by whom bail is to be taken. That the law may, therefore, define the magistrates, or officers, by whom the power is to be exercised. That in cases like the one under consideration, it has vested it in higher magistrates than parish judges, or justices of the peace; and that the latter must, therefore, abstain therefrom. On the part of the State, it has been contended, that the justice had jurisdiction, because the accused was charged with burglary and larceny; the latter offence authorizing a justice of the peace to bail. That it is certainly a *non sequitur*, because a justice of the peace is not bound to commit a person charged with larceny and may admit him to bail, but must commit him and deny to bail him if he be charged with burglary, that he must treat him with greater lenity, if he be accused of both. It is further urged, that by the act of 1818, (Bull. & Curry's Dig. 26,) the punishment of burglary has been altered, and is now "not exceeding fourteen years;" and the counsel for the State urges that a punishment of less than seven years may be inflicted. Burglary is, however, still punishable by more than seven years, for it may be by fourteen; and the object of the legislature was not to authorize a justice of the peace, who was prohibited from admitting to bail for an offence which might be punished by ten years, to do so for one which might be punished by fourteen.

It is, therefore, ordered, that the judgment be annulled and reversed, and that ours be for the defendants.

The Union Bank of Louisiana v. Bagley.

THE UNION BANK OF LOUISIANA v. DAVID T. BAGLEY.

The cashier of the branch of a bank, may, as an act of administration, accept the surrender of a debtor of the bank, and vote for a syndic; but without an express and special authority from the directors, he cannot discharge the insolvent. The granting of such a discharge is an act of ownership, and not of administration. C. C. 2965, 2966.

The discharge of an insolvent who has made a *cessio bonorum*, granted by the creditors, is not an absolute remission of the debt. It rather releases the person of the debtor, than extinguishes the debt itself, which will continue to exist for any balance not paid out of the assets surrendered.

APPEAL from the District Court of St. Tammany, *Jones, J.*

Halsey and Denis, for the plaintiffs.

Penn^d and A. Hennen, for the appellant.

MORPHY, J. The defendant is appellant from a judgment decreeing certain property in his possession, to be sold under a mortgage on the same, held by the plaintiffs. The property had been mortgaged in 1833, by Elijah Martin Terrell, to secure 24 shares of the stock of the Union Bank of Louisiana, upon which he subsequently obtained a loan of \$1080, and executed his bond for the amount, which is now reduced to \$840. In 1838, Terrell sold the property to the present defendant, subject to the mortgage securing the shares, which were also included in the sale. In 1841, E. M. Terrell made a surrender of his property to his creditors, and placed upon his *bilan* his aforesaid bond to the bank, together with divers other notes and obligations due to that corporation, some of which were secured by mortgage, while the others were ordinary debts. William A. Read, the cashier of the branch of the Union Bank at Covington, appeared at the meeting of the creditors, and, after voting for a syndic and accepting the surrender, granted the insolvent a discharge; but it does not appear, that he was authorized to give such discharge by any order or resolution of the bank. It is urged, on the part of the defendant, that the discharge given to Terrell, the mortgagor, by the plaintiffs' agent, extinguished the debt, and, with it, the mortgage on the property in his possession; and, in support of the cashier's power to give such a dis-

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charge, as administrator of the affairs of the bank, we have been referred to divers passages of Pothier and Duranton. The authorities relied on do not, in our opinion, show that the cashier was authorized, *virtute officii*, to grant a discharge to the insolvent. They speak of cases where the agent, as the only means of saving a part of the claim due by an insolvent, is obliged to abandon or remit the surplus. Under such circumstances, it is said, that the remission of a part of the debt, may be viewed as an act of administration. 2 Poth. Oblig. No. 583. 12 Duranton, No. 347. But, in the present case, the discharge was not an act necessary to save any of the rights of the principal, nor was it necessary to enable such principal to share in the distribution of the property surrendered. The cashier could accept the surrender, vote for a syndic, &c.; but he had no authority to discharge the insolvent without a special power to that effect. Such a discharge was an act of ownership, and not one of administration. An express power was, therefore, necessary. Civil Code, arts. 2965, 2966. But even were the cashier to be considered as authorized to give the insolvent a discharge, it is by no means obvious that it would have the effect contended for. Such a discharge is not an absolute remission of the debt. It is the species of discharge mentioned in art. 2173 of the Civil Code, which is a release of the debtor from his personal obligation to his creditor, and can be given in opposition to the wishes of the latter. In the words of Pothier, "*magis eximit personam debitoris ab obligatione, quàm extinguit obligationem.*" It looks to the future liability of the debtor for such surplus of the debt, as shall not be satisfied out of the property mortgaged to secure it, or out of the general assets of the estate surrendered; but leaves the debts in force, with all its accessories, until such settlement, or liquidation takes place. If the property mortgaged to pay the debt has passed into the hands of a third possessor, why should not the mortgage creditor have his recourse upon it, notwithstanding such a discharge, in the same manner as he enjoys his mortgage on the property, if it has been surrendered by the debtor? But, be this as it may, the cashier, as we have seen, was without authority to grant a discharge to the insolvent.

Judgment affirmed.

Bagley v. Tate, Sheriff, and others.

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DAVID T. BAGLEY v. HUGH D. TATE, Sheriff, and others.

The plea of discussion cannot be opposed to a creditor holding a special mortgage. C. P. 73. C. C. 3367. Nor can a third possessor of property mortgaged for a debt for which other property is also bound, require that it shall be held liable only for a *pro rata* portion of the debt. Each and every part of property mortgaged is liable for each and every portion of the debt.

The plaintiff in a suit commenced by injunction to stay an order of seizure and sale, cannot plead in a supplemental petition, filed after the issuing of the injunction, as an offset to the defendant's claim, matters which arose subsequently to the issuing of the injunction, and presented entirely new grounds.

APPEAL from the District Court of St. Tammany, *Jones, J.*

Penn and *A. Hennen*, for the appellant.

Halsey and *Denis*, for the defendants.

MORPHY, J. This is an appeal from a judgment dissolving an injunction, which the plaintiff had obtained to stay the execution of an order of seizure and sale sued out by the Union Bank of Louisiana, one of the defendants, upon certain property specially mortgaged to the bank, by the plaintiff's vendor, E. M. Terrell.

The ground mainly insisted upon in this court, is, that the mortgage on the property in the possession of the plaintiff, was extinguished and released, in consequence of a discharge given by the cashier of the branch of the Union Bank at Covington to the mortgagor, E. M. Terrell. This ground we have considered and disposed of, in another suit between the same parties, just decided. *Ante*, p. 43.

The position that, as there was other property, subject to the same debt, which had been surrendered by the mortgagor, no recourse could be had against the plaintiff until that was exhausted, or accounted for, is quite untenable. The plea of discussion cannot be opposed to a creditor holding a special mortgage; nor could it be contended that the property held by the plaintiff, was liable only for its *pro rata* proportion of the debt. Each and every portion of the property mortgaged, is liable for each and every portion of the debt. The mortgage is *tota in toto, et tota in qualibet parte*. Code of Practice, art. 73. Civ. Code, art. 3367. The judge below has, moreover, allowed the plaintiff a

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credit for the proceeds of the property sold which was subject to the same mortgage.

Our attention has been called to a bill of exceptions, to the opinion of the judge below rejecting a plea of compensation set up in an amended petition, filed long after the issuing of the injunction. The claim is alleged to be for damages, for the decay and dilapidation of certain other property mortgaged for the same debt, arising from the acts of the syndic, who is represented as the agent of the bank. The judge, in our opinion, did not err in excluding such a plea. It presented an entirely new ground, and matters that arose long after the injunction. It could not affect the rights of the bank, if their execution had been rightfully issued in the first instance. The claim, moreover, was an unliquidated one, which could not be pleaded in compensation. Civil Code, art. 2205. 7 Mart. N. S., 516. 7 La. 564.

Judgment affirmed.

CATHARINE WIMBISH v. ABRAHAM M. GRAY, Administrator of the Succession of Samuel Wimbish, deceased.

The right of a husband on the property of his wife under his administration, is similar to that of the usufructuary; and where the property owned by the wife at the time of the marriage, consisted of cattle, the rules laid down by arts. 586, 587 of the Civil Code, as to the responsibility of the usufructuary, apply to the husband. Thus, where the community is dissolved by the death of the husband, and the cattle brought by the wife into the marriage, are shown to have increased, she will be entitled to claim as her separate property a number equal to that brought by her into the marriage. Nor is it necessary that she should identify any of the cattle as those which belonged to her at the time of the marriage. If the whole herd do not die, the husband is bound to make good the number of the dead out of the new born cattle.

APPEAL from the Court of Probates of West Feliciana, *Weems, J. Ratliff*, for the appellant.

Paterson, for the defendant.

MORPHY, J. The petitioner, the widow of the late Samuel Wimbish, opposes the sale of the entire stock of cattle, hogs, horses, &c, advertised to be sold as belonging to the suc-

Wimbish v. Gray, Administrator.

cession of her husband, and prays for a partition thereof, between her and the succession. She alleges that, at the death of Samuel Wimbish, all the stock found on the premises was erroneously inventoried as belonging to the deceased; that when she married him, she brought into the community, property belonging in common to her and to the children of her marriage with Washington White, her first husband, which property was composed, in part, of 50 head of cattle: among which, were 12 milch cows and calves, 3 yokes of working oxen, 4 working horses, 1 saddle horse, 200 head of hogs, &c. The demand of the petitioner having been rejected, she appealed.

The record shows that the petitioner, then the widow White, intermarried with Samuel Wimbish, in 1827; that he went to reside on the place where she was then living, and resided there with her till his death, in 1843; that, at the time of her marriage with the deceased, the plaintiff had on the place a stock of cattle, left at the death of White, and some which she purchased at the probate sale of the estate of her father. From the testimony, her stock appears to have consisted of 50 head of cattle, a few horses, and 50 head of hogs. The administrator urges in support of the judgment appealed from, that the appellant has not shown that any of the identical cattle, horses, or hogs, belonging to her at the time of her marriage, were included in the inventory of her husband's estate; that the produce, or increase of the cattle she owned in 1827, were natural fruits, and belonged to the community of goods existing between them, which she has since renounced; and that, therefore, she is entitled to no portion of the same.

The right of the husband on the property of the wife under his administration, assimilates itself very much, we think, to that of the usufructuary. Thus, where there exists a community of gains, the fruits of the paraphernal property are declared to belong to the conjugal partnership. Arts. 2363, 2371. If a usufruct exists only on one head of cattle, and it dies without any neglect on the part of the usufructuary, he is not bound to return another, nor to pay its value. Art. 586. If a whole herd of cattle subject to the usufruct die, owing to some disease, or

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accident, without any neglect on the part of the usufructuary, he is bound to return to the owner only the hides of such cattle, or the value of such hides. Art. 587. If the whole herd do not die, the usufructuary is bound to make good the number of the dead out of the new born cattle, so far as they go. *Ib.*

In the present case the evidence does not show that the whole herd of cattle owned by the petitioner, at the time of her marriage, have died. On the contrary, it increased, in consequence of the care taken of it by Samuel Wimbish, who is shown to have been very attentive to his stock. It may be that the plaintiff cannot identify any of the cattle which existed in 1827; but this, we apprehend, is not necessary. She has shown that she owned fifty cattle and fifty hogs; these were mixed with the cattle of Samuel Wimbish; and the whole stock is shown to have considerably increased. If the right of the husband to enjoy the property of the wife is to be governed by the rule laid down for the usufructuary when it consists of a herd of cattle, and, we think, it should be, the plaintiff is entitled to have set apart as her property, a number of cattle or hogs equal to that which existed in 1827, such as have died during the community being replaced out of the new born cattle. Without the protection of such a rule, all the property brought in marriage by the wife might be lost to her, or her heirs. In several parts of this State the property brought by the wife consists mainly, if not wholly, of cattle. After a number of years, the original cattle composing the herd cannot be identified, and sometimes no longer exist, although the stock itself has considerably increased.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be reversed; and it is further ordered, that there be a partition between the petitioner and the estate of her husband, in which fifty head of cattle and fifty hogs shall be set apart as her separate property. The costs to be borne by the estate.

THE UNION BANK OF LOUISIANA v. JOSEPH D. SMITH and others.

A creditor whose debt is payable in instalments, and secured by mortgage, on the failure of the debtor to pay any instalment, may require the property to be sold for the payment of the whole debt, provided that the sale be for cash for so much only as is due, and for the balance on the terms of credit stipulated in the original contract. C. P. 686.

APPEAL from the District Court of West Feliciana, *Johnson, J.*

SIMON, J. This action is prosecuted by the Union Bank of Louisiana, for the immediate recovery of the amount of two promissory notes, which, with eight other notes, executed by the same parties, are secured by a special mortgage on certain property described in the petition. The notes sued on were duly protested at maturity; but the other eight notes, not being due at the time of the institution of this suit, the plaintiffs pray that the property mortgaged may be decreed to be sold *for cash*, to pay the sum due and costs, and *on a credit to meet the other eight notes* described in the act of mortgage.

The defendants pleaded the general issue, and denied specially the demand alleged, as also the protest and notice of protest. Judgment was rendered below against the defendants *in solido* for the amount sued for, ordering the property mortgaged to be seized and sold to satisfy the same.* From this judgment the Bank has appealed.

The appellants complain that the judgment appealed from is erroneous, in this: that it should have decreed the mortgaged property to be sold to pay all the notes described in the act of mortgage, on terms of credit corresponding with the periods of maturity of the eight notes not due, respectively.

We think the right claimed by the appellants was improperly denied to them, and that judgment ought to have been rendered below according to the prayer of their petition. In the case of

* The judgment was only for the amount of the notes already due, no notice being taken of the prayer for the sale of the property on a credit to meet the other notes as they matured.

Pepper et al. v. Dunlap, 16 La. 164, in which a very similar question was presented for our solution, we held, after the most mature consideration, that "when a seizing creditor only sues for such instalments of a debt, secured by privilege or special mortgage, as are due, the property so mortgaged is to be sold for the whole of the debt, on such terms of credit as are granted by the original contract, although such creditor does not show that the subsequent instalments belong to him, or that he is the holder of all the notes mentioned in the contract of mortgage; and that it suffices that the several instalments not due, be mentioned in the petition." This is in accordance with art. 686 of the Code of Practice, which gives to the seizing creditor who has a privilege, or special mortgage on the property seized, the right of demanding that the property be sold for the whole of the debt, provided it be on such terms of credit as are stipulated in the original contract; and, as we have no reason to be dissatisfied with our previous opinion, we must come to the conclusion that the plaintiffs had a right to require the property mortgaged to be sold, not only to satisfy for cash the amount of the note sued on, but also on such terms of credit as to meet the payment of the other eight notes as they shall become due hereafter respectively; and, in this respect, the judgment appealed from must be amended.

As the appellees have not in any respect prayed for the amendment of the judgment complained of by the appellants, we have not to enquire into the question of notice presented by the pleadings. Said judgment cannot be considered as in any manner complained of, or appealed from by them, as they have not thought proper to join issue with the plaintiffs and appellants, or to appeal from it.

It is, therefore, ordered and decreed, that the judgment of the District Court be so amended, as to order further, that the property mortgaged be seized and sold not only to satisfy the amount claimed in the petition, *for cash*, but that the same be also sold on such terms of credit as are granted by the contract of mortgage, for the payment of the other eight notes therein specified as not due at the time of the institution of this suit;

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and that the judgment appealed from be affirmed in all other respects, with costs in both courts.

Winter, for the appellants.

Boyle, for the defendants.

THE UNION BANK OF LOUISIANA v. MARGARET KINDRICK.

Payments made by one who owes a debt bearing interest, cannot, without the consent of the creditor, be imputed to the reduction of the capital, while any interest is due. C. C. 2160.

APPEAL from the District Court of Livingston, *Jones*, J.

MARTIN, J. The Bank is appellant from a judgment in its favor, on a note of the defendant's, and complains of an erroneous imputation of partial payments to the capital, instead of to the interest.

Her note was due on the 22d of April, 1840, for \$3371 00

On the 1st of April, 1841, interest was due for

343 days, at seven per cent, - - - -	224 80
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3595 80

A payment was then made of - - - -	500 00
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Balance, - - - -	3095 80
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On the 1st of October, 1841, interest was due on

that last sum for 183 days, at the same rate,	110 15
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3205 95

There was on that day paid, - - - -	285 87
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Balance, - - - -	2920 08
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On the 1st of April, 1842, interest was due on the

last sum for 182 days, at the said rate, -	103 50
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3023 58

There was on that day paid, - - - -	418 00
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Balance, - - - -	\$2605 58
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 Andrews v. Rhodes.

The District Court gave judgment for a less sum, admitted to be due by the defendant's counsel. Both erroneously imputed the payments to the principal, instead of to the accrued interest. Civil Code, art. 2160. *Hynson et al. v. Maddens et al.* 1 Mart. N. S. 571.

The plaintiff claimed \$3 50, for costs of protest, which were allowed; and \$125 08, for an error in favor of the defendant, in her note. This sum was disallowed, properly, we believe, on the evidence; but we think it best to reserve the Bank's right therefor, if it can be established in another suit.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and that the Bank recover from the defendant the sum of \$2605 58, with interest, at the rate of seven per cent per annum, from the 1st of April, 1842, until paid; and \$3 50, for costs of protest; its right being reserved on the claim of \$125 08; the defendant and appellee paying the costs in both courts.

Halsey and Denis, for the appellants.

Davidson, for the defendant.

 THOMAS L. ANDREWS v. SARAH RHODES.

Prescription runs against a note payable on demand, from its date, not from that of the demand. *Per Curiam*: Prescription attaches to a right from the moment that it can be exercised.

Defendant sued on a note without date, but bearing interest from a certain day, pleaded prescription, and the court, assuming that the note was made on the day from which it bore interest, gave judgment in his favor. *Held*, that the court erred in assuming that the note was made on the day from which it bore interest; and that defendant was bound to prove the facts from which relief was sought under the plea of prescription.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

Morgan, for the appellant.

Elam, for the defendant, cited Civ. Code, art. 1953.

MARTIN, J. The plaintiff is appellant from a judgment sustaining the defendant's plea of prescription to the note sued

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120	850

upon.* It is payable on demand, and bears interest on its face, from the 1st of January, 1836, but is without a date.

The first judge assumed the day from which interest is to run as the date of the note; and more than five years having elapsed between that day and the inception of the present suit, sustained the plea of prescription.

The plaintiff's counsel urges that he erred, as the defendant was bound to prove the facts from which the prescription arises, which she failed to do; that the court erroneously assumed the day from which interest was to be computed, as the date of the note; that prescription on a note payable on demand runs only from the demand, and that none is proved but the judicial.

The defendant's counsel urges that his client is an illiterate woman, as it appears that she cannot write and made her mark; that she could not detect the omission of the date; that the plaintiff could, and that he ought to have insisted on its being supplied; and he relies on the 1953rd article of the Civil Code.

We cannot agree with the plaintiff's counsel, that prescription does not run on a note payable on demand until the demand, for if it was so, the holder could prevent the prescription from beginning, as long as he pleased, by delaying the demand. Prescription attaches to a right from the moment it may be exercised.

We think, however, with him, that the court erred in assuming that the note was made on the day from which it bears interest, and that the defendant was bound to adduce legal proof of the fact from which she seeks relief under the plea of prescription. She might have done so by affixing a date to her note, and it does not appear to us that her inability to write enables us to help her. The article of the Civil Code on which her counsel relies, may, perhaps, with more propriety be invoked by the plaintiff.

It is, therefore, ordered, and decreed, that the judgment be annulled and reversed, and that the plaintiff recover from the defendant the sum of \$416 56, with interest at the rate of ten per cent a year, from the 1st of January, 1836, until paid; the defendant and appellee paying the costs in both courts.

* The judgment was against the plaintiff as in case of a non suit.

ELIZA HALEY v. ISAAC DUBOIS.

The effect of the clause *de non alienando* in a mortgage, is to render void, as regards the mortgagee, any alienation or transfer of the property made in violation of the mortgage; and the mortgagee may have the property seized and sold as if no change of owners had taken place, and without making the vendee of the mortgagor a party to the executory proceedings.

APPEAL from the District Court of East Baton Rouge, *Johnson, J. Busk and Herron*, for the plaintiff.

Brunot, for the appellant.

MORPHY, J. The defendant appeals from a judgment perpetuating an injunction, sued out by the plaintiff to prevent the sale of a negro, whom he seized in her possession, and whom she had purchased from her mother, Susanna Barrow. This slave had been mortgaged to the defendant by the former owner, who had bound herself not to alienate the property to his prejudice. The ground on which the injunction was taken and perpetuated below is, that the slave was seized in the hands of the present possessor without any previous notice of seizure being given to her, and that the plaintiff in injunction, although deprived of the rights of a third possessor in consequence of the clause *de non alienando* in the mortgage of her vendor, was entitled to the same delays, and notices as the original debtor in a direct action of mortgage against her. The record shows that the sheriff, before making the seizure, gave the three days notice required by law to the original debtor, Susanna Barrow, and that, not finding the slave in her possession, he seized in the hands of the purchaser, Eliza Haley, and then gave to the latter a notice of such seizure before he advertized the property for sale. It is not easy to perceive in what manner the plaintiff has been injured. This court has repeatedly held, that the effect of the pact "*de non alienando*," is to render void, as regards the mortgage creditor, any alienation or transfer made in violation of it. The mortgagee can have the property seized and sold as if no change of owners had taken place, and without making the vendee of the mortgagor a party to the executory proceedings under the order of seizure and sale. 2 Mart. N. S. 32. 1 La. p. 29. 13 La. 314. 15 La. 263, 473. If, then, un-

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der these adjudications, the defendant had a right to have the property seized and sold without any notice to the plaintiff as a third possessor, she has surely no cause to complain when it is shown that she has been notified of the seizure.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed; and it is further ordered, that the injunction be dissolved, and that the plaintiff pay the costs in both courts.

MYSON H. ALLEN *v.* HIRAM A. HART and others.

A purchaser of moveable property, cautioned against buying on the ground that the vendor had no authority to sell, cannot invoke the presumption of ownership resulting from the possession of his vendor. He will be liable to the owner for the value of the articles purchased.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

Avery and Elam, for the plaintiff.

G. S. Lacey, for the appellants.

MORPHY, J. This action is brought to recover two flat-boats loaded with corn, or \$1200 for their value, on the averment that these boats, the property of the petitioner, were collusively and fraudulently sold to the defendants, Hart and Bossley, by one William Hovey, in whose charge they had been placed at some distance above Baton Rouge, to be taken to New Orleans, and there delivered to the plaintiff. There was a judgment below against the defendants, from which they appealed.

The evidence clearly establishes the ownership of the plaintiff, the value of the boats and their cargoes, the employment of Hovey as steersman to run the boats to New Orleans, and the sale of the property to the defendants, on its reaching Baton Rouge, in the beginning of June, 1843. The purchasers rest their defence on the good faith with which they say they acted in the business, and on the custom which, according to some of the witnesses, prevails generally on the river Mississippi for the steersman to sell the cargo of a flatboat under his charge, by

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wholesale or retail, for the account of the owner. It may be that instructions are often given by the owners of flatboats to sell their cargoes along the coast as they descend the Mississippi, and that this right of the steersman to sell, which, they say, is supposed to exist, has grown out of this circumstance. Even were this custom better established than it is, and were we ready to sanction it as an excuse for buying produce from any one without inquiry as to his right to sell, it could not avail the defendants in the present case. The testimony does not permit us to consider them as *bona fide* purchasers, although they gave for the corn a price, which the witnesses say was a fair one at that time. It is clearly shown that they were apprized by Hovey himself that he was not the owner of the boats, and that as steersman he was running them to New Orleans for a person who was there shipping corn. It is true that he told them he had a right to sell; but this assertion, if it could be considered as sufficient to justify the purchase, was contradicted by some of the hands on board. Calloway, one of them, testifies, that about fifteen or twenty minutes after the arrival of the boats; the defendants came on board and wanted to buy the corn; that he informed them that it was not for sale, but was consigned to New Orleans; that about one hour afterwards, they returned with the steersman, Hovey, who had gone ashore, and proposed again to buy the load, when Hovey agreed to sell one of the boats; that when the bargain was about being closed, the witness called Hovey aside and advised him not to sell, which he then declined doing; that the defendants left the boat, and began abusing the hands for interfering with the sale; that the witness and another hand then told the defendants that Hovey had no authority to sell; that the boats were consigned to New Orleans to Allen, the owner, who was there waiting for them; that Hovey had only been employed to steer the boats to that place; that to this the defendants answered, that the steersman had a right to sell; that some time after Hovey went out, and on his return about an hour after, he announced that he had sold one of the boats to the defendants; and that on the evening of the next day he sold to them the other boat. From this testimony, independent of other circumstances dis-

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closed by the evidence, it is clear that the defendants knew that the sale made to them by the steersman was without authority, in violation of his express instructions, and in fraud of the rights of the plaintiff, who, the evidence shows, was then in New Orleans shipping corn, and anxiously waiting for these boats. The eagerness shown by the defendants to make the purchase is explained by one of their own witnesses, from whom we learn that they wanted the corn to fill engagements they had on the coast. They acted then with their eyes open, and must abide the consequences of their total disregard of the rights of others. This case bears much analogy to that of *Marks v. Landry*, decided a few days since, 9 Rob. 525, but is much stronger against the defendants, as they were put upon their guard, and cannot invoke the presumption of ownership which results from the possession of moveable property, or even the custom under which it is supposed that steersmen have a right to sell the cargoes of the boats under their charge. See the case of *Marks v. Landry*, and the authorities there quoted.

Judgment affirmed.

 THOMAS WILKINS v. THE PARISH OF EAST BATON ROUGE.

A new trial should be allowed whenever justice requires it.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

MORPHY, J. The petitioner seeks to recover of the defendants the amount of two warrants on their treasurer, subscribed by Samuel Skolfield, their auditor of accounts, one for the sum of \$532, and the other for \$468. The defence is, that these drafts were given in error; that the Police Jury became indebted to the plaintiff on a contract to build a parish jail, and for extra work thereon in the sum of \$8582, but that, in discharge of that obligation, the auditor for the parish erroneously furnished the plaintiff, from time to time, warrants on the parish treasury, including the two now sued on, for the sums of \$9481 44, the

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warrants thus exceeding his just demand against the parish by \$899 44, which sum is pleaded in compensation, and prayed to be credited on the drafts claimed. The contract entered into between the parties for the building of a parish jail, shows that the sum agreed on was \$8000, and the auditor of the parish, who was examined as a witness, testified that the amount of extra work done by the plaintiff on the parish jail and clerk's office was \$532; that this sum had been allowed by the Police Jury, and a warrant for it issued to the plaintiff, which is one of the two sued on. This witness proved that the plaintiff received from him warrants, at different times, amounting to \$9481 44; but his testimony, as taken down on the trial, did not show the consideration for which these warrants had been issued. The court below, in rendering judgment in favor of the plaintiff, was probably of opinion that these warrants, being evidences of indebtedness against the defendants, and it not appearing why they were given, no error or mistake had been shown. The defendants moved for a new trial, on the ground that the clerk, in taking a note of the evidence, had omitted to state that all the warrants issued in favor of the plaintiff were for the building of the parish jail, and for extra work on the same and the clerk's office, as it appeared from the auditor's book, which had been brought into court, and to which he was called upon to refer on the trial. To this motion they annexed an extract from the auditor's book, sworn to by that officer. From this extract, or transcript, it appears that the parish warrants which issued to the order of Thomas Wilkins, and amount to \$9481 44, were all on account of the building of the jail, with the exception of two warrants, amounting together to \$582, which are mentioned as being for extra work done on the jail and clerk's office. The sum given for extra work being deducted from the aggregate amount of all the warrants, would leave \$8899 44, as having been paid for the building of the jail, when by the contract \$8000 only were due. This, we think, was a sufficient showing to have induced the judge to use his discretionary power, of allowing a new trial whenever the ends of justice seem to require it. If there has been extra work done to the amount of \$1481 44, instead of \$582, as would appear from the warrants

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issued to the plaintiff's order, the latter will have an opportunity of showing it. Unless this be done, the defendants will appear to have overpaid a sum of \$899 44, on their contract with the plaintiff.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and the case remanded for further proceedings; the plaintiff and appellee paying the costs of this appeal.

Brunot, for the plaintiff.

Elam, for the appellants.

THE BANK OF LOUISIANA v. JOHN HENRY BLACK and others.

Where the protest of a note and the notary's certificate of notice is offered in evidence, the opposite party cannot interrogate the notary as to whether the act offered is an original or a copy, and whether the act of record is signed by the witnesses named in the protest. *Per Curiam*: The act of the notary, such as it is presented, must have the effect it is entitled to, without any explanation by witnesses, or being eked out by parol evidence.

Where a protest offered in evidence in an action against the endorsers of a note, shows on its face that the note was protested in the presence of two witnesses, but that they did not sign that part of it which certifies the demand and refusal to pay, and the certificate attached, showing in what way the notices were served, appears to have been signed in the original by two witnesses, and the notary certifies a copy from his records, it is sufficient.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

BULLARD, J. This is an action against the drawer and endorsers of a promissory note; and the bank is appellant from a judgment in favor of the endorsers.

The protest and certificate of the notary show that the note was regularly protested on the 3d of December, (the last day of grace, to wit, the 4th being Sunday,) and that regular notice was given, either in person, or at the domicils of the endorsers in the town of Baton Rouge.

But it appears from a bill of exceptions taken by the plaintiffs' counsel, that the defendants propounded to the notary the

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following questions, to wit: Is the act called a protest, the original, or a copy; and, Is the act of record signed by the witnesses named in your protest? This was objected to, on the ground that the verity of the protest was not at issue; but the court permitted the questions to be propounded. The notary answered: "That he writes in his book of protests an instrument similar to that to which the note is attached, which is signed by the witnesses. In making that part of the protest to which the note is attached, he says it was protested in presence of the witnesses, but does not copy their signatures—all of which was done in this case; the part to which the note is attached is not signed by the witnesses."

We think the question was not properly permitted. The act of the notary, such as it is presented, must have such effect as it is entitled to, without any explanation by witnesses, or being eked out by parol evidence. See *Peet et al. v. Dougherty*.

The protest shows, on the face of it, that the note was protested in the presence of two witnesses, but that they did not sign that part of the protest which merely certifies the demand and refusal to pay. The certificate attached, showing in what way notices were served, appears to have been signed in the original by two witnesses, and the notary certifies a copy from his record. This, we think, sufficient. 5 Mart. N. S. 511. 19 La. 448. Bullard and Curry's Digest, 43. 1 Robinson, 66. 15 La. 38.

But, independently of the certificate of the notary, sufficient evidence, in our opinion, was given on the trial, of a demand and notice of non payment, to bind the endorsers.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that the plaintiffs recover of M. L. Meeker and P. A. Walker, *in solido*, the sum of four hundred and eighty dollars, with interest at nine per cent from the date of the protest, and the costs in both courts.

Brunot, for the appellants.

Ivor, for the defendants.

The Commercial Bank of Natchez v. Perry.

THE COMMERCIAL BANK OF NATCHEZ v. ROBERT PERRY.

After the dissolution of a firm none of the former partners can bind the others, nor the firm, without special authority derived from a new contract.

Where a bill is payable at a certain time after date, it is not absolutely necessary to have it accepted, an acceptance being only necessary to fix the period of payment, where a bill is payable at sight, or at so many days after sight or demand, or after a certain event. It will suffice that a demand be made of the drawees at maturity, and notice given to the drawer in case of their default.

Where a bill drawn on a commercial partnership, is accepted, after the dissolution of the firm, by one of the partners, payable at a particular bank, but he is not shown to have been authorized by his former partners to bind the firm, and demand of payment was made only at the bank, no demand having been made of the drawees, the drawer will be discharged.

A promise to pay the amount of a bill, made by the drawer, after discharge, in consequence of want of demand of payment of the drawees, will not be binding, unless it be shown that he was aware of his discharge at the time of the promise.

APPEAL from the District Court of East Feliciana, *Johnson, J. Lyons*, for the plaintiffs. A promise by a drawer to pay, after a knowledge of his release, is binding. Chitty on Bills, 372, 373, 523, 536. 12 La. 465. 13 La. 368. 18 La. 333.

A. M. Dunn and Roselius, for the appellant.

MORPHY, J. The defendant is appellant from a judgment rendered against him, as the drawer of a bill of exchange for \$7,315 71, dated the 11th of May, 1838, and made payable to his own order, twelve months after date. This bill, which was drawn on the commercial firm of Bullitt, Ship & Co., is alleged to have been presented by the holders to the drawees, and to have been duly accepted by the latter; and the petition, after making the ordinary averments of demand, protest and notice, further alleges that the defendant, being well acquainted with all the circumstances of such protest and notice, has often promised to pay the bill, but has failed to do so.

On the trial a draft was offered in evidence purporting to be accepted by Bullitt, Ship & Co. in liquidation, by Wm. Ferri-day. To the introduction of this instrument the defendant's counsel objected, and he excepted to the opinion of the judge, who admitted it in evidence. The conclusion we have come to on the merits of the case, renders it unnecessary for us to notice

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the grounds on which the draft was sought to be excluded. Admitting it to have been properly received in evidence, the petitioners have not alleged, nor proved that Wm. Ferriday had any authority from the other members of the firm of Bullitt, Ship & Co., to use the partnership name. The bill of exchange on which defendant is sought to be made responsible, was drawn on Bullitt, Ship & Co., a commercial firm, which he believed to be still in existence, and in whose hands the evidence shows that he had a sum nearly equal to the amount of the draft. It was accepted by Wm. Ferriday, after the dissolution of the partnership. Now it is well settled that after a dissolution of the firm, neither of the former partners can bind the others, nor the firm, without special authority, derived from a new contract between them. 4 La. 32. 6 La. 683. 8 La. 568. 18 La. 334. 3 Kent, p. 50. Gow on Partnership, p. 230. There has, therefore, been no acceptance of the bill, binding on the drawees. As the bill, however, was made payable twelve months after date, it was not strictly necessary to have it accepted, an acceptance being absolutely necessary only to fix the period when a bill is to be paid, if made payable at sight, or at so many days after sight, or after a certain event, or after demand. Story on Bills, § 228. A presentment of the bill to the drawees for acceptance might have been dispensed with, and had a demand been made of the drawees at its maturity, and notice of their default been given to the defendant, he would have been bound; but in the present case, the bill was presented and accepted by Wm. Ferriday, *payable at the Commercial Bank at Natchez*. At the maturity of the bill, no demand was made of the drawees, Bullitt, Ship & Co., but it was presented at the Commercial Bank at Natchez, and a demand was made of the teller of the bank, and upon his refusal to pay, the protest was made. Now if Ferriday was without authority to accept the bill, and make it payable at the bank, it is clear that a demand at that place cannot be considered as a demand upon the drawees, and that, therefore, there has been no such demand as was necessary to bind the drawer. The counsel for the plaintiffs insists, that if the demand is insufficient, yet the defendant is liable as he promised to pay the bill after its dishonor. The evidence shows

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that such a promise was made, and that the defendant submitted to the bank's agent divers propositions to effect a settlement; but so far from it appearing that he acted with a full knowledge that he had been released, it is shown that it was only a short time before the institution of this suit, and long after he had proposed a settlement to the bank, that he became aware of his release from all liability. Two of the plaintiffs' witnesses say, that they supposed he was acquainted with the circumstances connected with the dishonor, protest, and notice; but they do not intimate that he had any knowledge of Ferriday's want of authority to accept, and of the consequent informality of the demand. On the contrary, Turner, one of these witnesses, who acted as the plaintiffs' counsel, informs us that he told the defendant that every thing was regular, and that he was legally bound to pay the debt. This testimony repels the idea, that when the defendant proposed a settlement to the bank, he was aware of his release. It is hardly to be supposed, that with a full knowledge of his being exonerated, he would have renewed his obligation, when it is recollected that at the time of drawing this bill, he had a large sum of money in the hands of the drawees, who have since become bankrupts. 11 La. 16. 12 La. 467.

It is, therefore, ordered, that the judgment of the District Court be reversed; and that ours be for the defendant, as in case of non suit, with costs in both courts.

 ELIHU HOOPER v. THE UNION BANK OF LOUISIANA and another.

Where a second mortgagee, to whom the property has been mortgaged to secure him against any liability for certain endorsements made by him for the mortgagor, claims to be paid by preference over the first mortgagee out of the proceeds of the property sold under the first mortgage, but does not allege, nor prove that he has paid, or become liable to pay any of the notes endorsed by him, his petition must be dismissed.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

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Brunet, for the appellant. A mortgage on slaves must be recorded in every parish into which the mortgagor may remove his residence, with the property. Civ. Code, arts. 3314, 3315, 3317, 3318, 3328, 3329. Act of 26 March, 1813, Bullard & Curry's Digest, 596.

Winter, for the defendants.

MORPHY, J. On the 3d of June, 1835, Sarah Rhodes, for herself and as tutrix of her children, mortgaged to the Union Bank certain slaves for \$2000, which mortgage was duly recorded in the parish of East Feliciana, where she then resided and had her domicil. In 1839, Sarah Rhodes removed with the slaves mortgaged into the parish of East Baton Rouge, where she resided from March, 1839, to January, 1840, when she moved into the parish of Livingston, resided there about one year, and then returned, with her slaves, to the parish of East Baton Rouge, where she has had her domicil ever since. In April, 1840, Sarah Rhodes sold to her son Theodore B. Rhodes, her undivided half of the slaves mortgaged, and of other slaves which she held in common with her children. T. B. Rhodes, in March, 1840, mortgaged the slaves to the plaintiff, Elihu Hooper, to save him harmless, and secure him from loss on account of his having endorsed three notes of his, for \$1286 66 $\frac{2}{3}$ each, payable to the order of Sarah Rhodes, at one, two, and three years from the 10th of the same month. This mortgage was recorded in the parish of East Baton Rouge, on the 23d of July, 1844. The Union Bank, under a judgment obtained upon their mortgage in East Feliciana, issued an execution directed to the sheriff of East Baton Rouge, who levied upon the slaves mortgaged to that institution. The plaintiff then brought the present suit, alleging that his mortgage on the slaves seized, though posterior in date to that of the Bank, should have precedence over it, as the mortgage of the Bank had never been recorded in the parish of East Baton Rouge, where the owner of the slaves resided, and where his own mortgage was recorded prior to the seizure of the property. He prays that the sheriff be directed, out of the proceeds of the sale of these slaves, to retain the sum of \$3859 98; and that such sum, or whatever sum, if less, the slaves may bring, be held subject to his mortgage thereon, by

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reason of his right of preference over the bank, &c. There was a judgment below dismissing the plaintiff's demand, and the present appeal was taken.

It is urged that the bank, by their failure to record their mortgage in East Baton Rouge, have lost their rights under it as regards the plaintiff, a subsequent mortgagee. Were it absolutely necessary to decide this case on the ground assumed, we would hesitate long ere we would declare that a creditor, whose mortgage on slaves has been once legally recorded at the time of its execution in the parish where the owner of the slaves resided, is bound to follow the mortgagor into every other parish where he may afterwards think proper to reside, and have his mortgage recorded in each parish in order to protect himself against subsequent mortgages. It seems that a mortgage when lawfully acquired becomes a vested right, which cannot be destroyed by any act of the mortgagor, or of third persons. But, be this as it may, the plaintiff has not shown himself entitled to any portion of the proceeds of the sale. His interest in the property was only a contingent one. He has not alleged, nor proved that he has paid, or become liable to pay any of the notes he endorsed; nor does it even appear that the notes which were all past due at the time of the trial below, were protested for want of payment by the maker. The plaintiff's demand was then properly rejected below.

Judgment affirmed.

LILLY McRAE v. WILLIAM W. CHAPMAN, Sheriff, and others.

A sheriff, by whom real property is about to be sold, is required by law to read a certificate from the Recorder of Mortgages, showing all the mortgages existing on it; and he should announce that the purchaser is entitled to retain in his hands out of the price of the adjudication, the amount required to satisfy the privileged debts and special mortgages to which it is subject, taking the bond of the latter, when the sale is on a credit, only for the surplus. If the bid be insufficient to discharge anterior special mortgages, no adjudication can take place.

Where the certificate read by the sheriff at the sale of property at twelve months credit, omits to mention a mortgage in favor of certain prior vendors of the pro-

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perty, and the purchaser is afterwards evicted by them, the bonds of the purchaser will be annulled, as given in error and without consideration. The omission, of itself, is enough to invalidate the adjudication. C. P. 678, 683, 684. C. C. 1813, 1818.

APPEAL from the District Court of East Feliciana, *Johnson, J. Merrick*, for the plaintiff.

Lyons, for the appellant.

MORPHY, J. The plaintiff, a purchaser at a sheriff's sale, gave two twelve months' bonds, which she now seeks to have cancelled, on the ground that she has been evicted of the property adjudicated to her, under a previous mortgage not recited in the certificate of mortgages read at the sale. She sued out an injunction to stay an execution which had issued on her bonds; and this injunction having been made perpetual on a hearing of the case below, the present appeal was taken.

The record shows, that under a *feri facias* in a suit of *Goodman & Levy v. S. B. Nunn*, an acre of land, with the improvements on it, was seized and adjudicated to the plaintiff, in April, 1840, for the sum of \$814 08, for which she gave two twelve months' bonds, with William Dunn, as her security; that the certificate of mortgages, which was read at the sale, contains a list of mortgages existing against Nunn, the defendant in execution, and, among others, that of his vendors, Patrick and Morgan, for \$600, but makes no mention of a vendor's privilege for \$1000 on said acre of land, duly recorded in favor of William Terrell against his vendee John M. Trescott, who had sold the land to Patrick and Morgan; that in November, 1842, on an order of seizure and sale obtained by Terrell upon his vendor's mortgage, the property was seized and sold to J. S. R. Guay. Under these facts, the petitioner was, we think, entitled to the relief allowed her below. The twelve months' bonds were clearly given in error, and without cause or consideration, as there was no legal sale of the property to the plaintiff, and she was subsequently evicted thereof. The price she bid was not sufficient to cover the special mortgages on the property having a preference over the judgment under which the sale took place, it being only for \$814 08, when the special mortgages amounted to \$1600, to wit: \$600 in favor of Patrick and Mor-

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gan, and \$1000 in favor of William Terrell, an anterior vendor of the property. The sheriff should have read at the sale, a certificate showing all the mortgages existing on the premises seized. He should have announced that the purchaser was entitled to retain in his hands, out of the price of the adjudication, the amount required to satisfy the privileged debts and special mortgages the property was subject to, and should have taken a twelve months' bond only for the surplus. If the bid offered was insufficient to discharge such anterior special mortgages, no adjudication could lawfully take place. The purchase, moreover, being made with reference to the mortgages shown to exist by the certificate which the law requires to be read at sheriffs' sales, the omission in it of the special mortgage in favor of Terrell, may, of itself, be considered as a sufficient cause to invalidate the adjudication. It is hardly to be presumed that the plaintiff would have made the contract, and given her bonds, had the existence of this mortgage been known to her. Code of Practice, arts. 678, 683, 684. Civil Code, arts. 1813, 1818. 1 Mart. N. S. 600. 2 *Ib.* N. S. 604. 4 *Ib.* N. S. 154. 3 La. 418. Had the plaintiff paid the amount of her bid, and been subsequently evicted, she would have had her recourse for reimbursement against the plaintiffs and defendant in execution. Code of Practice, art. 711. Civil Code, art. 2599. If so, why should she be compelled to do the vain thing of paying to the plaintiffs in execution, money which she would be entitled to recover back by suit, in consequence of the eviction. *Lex neminem cogit ad vana.*

It has been urged by the appellant's counsel that if the plaintiff is injured by the omission or carelessness of the parish judge, she should look to him for indemnity, and that the plaintiffs in execution should not be the loser. In a case at Opelousas, in Sept. last (*Smith v. Moore*, 9 Rob. 65) we intimated that the recorders of mortgages are bound to state in their certificates all the mortgages existing on the property seized, although not standing in the name of the defendant in execution, if their records enable them to do so. We are, therefore, by no means prepared to say, that the parish judge would not be liable to the plaintiff, had she paid her bonds, and could not recover back

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the money from the seized debtor, or the judgment creditor; but, in the present case, there has been as yet no loss to any one, in consequence of the omission in the judge's certificate. The purchaser has not paid her bid, and the plaintiffs in execution would have made nothing out of his writ had the certificate shown all the mortgages on the property, and had the requisites of the law been complied with.

Judgment affirmed.

MARY M. SOWELL and Husband v. WILLIAM P. COX.

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Where the plaintiff, in a petition to enjoin an order of seizure and sale obtained on a mortgage to secure a note, alleges the illegality of the note as the ground of enjoining the sale, the injunction cannot be dissolved on the face of the pleadings. An injunction may be had, whenever it is necessary to preserve the property in dispute pending the suit.

Wherever it is shown that the consideration of the obligation of a married woman, contracted jointly with her husband, enured to her use and benefit, and was not a thing which her husband was bound to furnish her with, she will be bound thereby. She cannot, in such a case, be considered as having bound herself as security for her husband, or conjointly with him for a debt in which he alone is interested. As where a sum of money, for the repayment of which a note was executed jointly by the husband and wife, was applied to the extinguishment of a debt due by the husband to a minor, which was secured by a general legal mortgage existing on certain property of the husband's at the time of its purchase by the wife. *Per Curiam*: The consideration of the obligation may be viewed as a part of the price of the property purchased by her.

To entitle an inferior mortgagee to be paid, under art. 403 of the Code of Practice, out of the property seized, in preference to one having only a general or legal mortgage, he must prove that the debtor has other property of sufficient value to satisfy the anterior general or legal mortgage.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

A. M. Dunn and Elam, for the appellants.

G. S. Lacey, for the defendant.

SIMON, J. An order of seizure and sale having been obtained by the defendant, Cox, on an act of mortgage importing a confession of judgment, which mortgage was executed by the plaintiffs on certain slaves declared in the act *to be the separate and*

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paraphernal property of Mrs. Mary M. Carney, one of the obligors, for the purpose of securing the payment of a note of \$600, executed by said plaintiffs to the order of the defendant for value received, and which note was paraphed "*Ne varietur*" by the notary who passed the act, the present suit was instituted by the said Mary M. Carney, wife of William Sowell, with the assistance and authorization of her husband, with the view of arresting the sale of her slaves, and of being discharged from the payment of the note by her executed jointly with her said husband.

She states in her petition, that she is separated in property from her husband, by judgment rendered on the 3d of July, 1841, on which day she recovered against him, among other things, a judgment for \$5,000. That having issued an execution which was levied on the property of her husband, she purchased at a sheriff's sale, on the 27th of October, 1841, a number of slaves whom she names, and thereby acquired a title thereto. She further represents that, afterwards, she was induced to sign, conjointly with her husband, a promissory note for \$600, payable to W. P. Cox, with interest, and to execute with her said husband, a mortgage in favor of said Cox, on the aforesaid slaves acknowledged in the act to be her paraphernal property. That said note and mortgage were not given for any debt due by her, or for any contract by which she was benefitted, but were for a debt due by her said husband to Cox. She complains of the order of seizure and sale obtained by Cox and issued at his request, and says that she is advised that she could not bind herself conjointly with her husband, in any contract for his benefit, or for him. She, therefore, prays that an injunction may be issued to prevent the sale of her slaves, that the mortgage be cancelled, and the injunction made perpetual.

The defendant first moved to dissolve the injunction, with interest and damages, on the ground that no such reason is alleged in the petition for obtaining the same, as is contained in art. 739 of the Code of Practice. On the next day he filed his answer, in which it is alleged that the property seized is the property of Wm. Sowell. He further states that the note and mortgage by him sued on, were made and given for

the benefit of the plaintiff Mary, and for her separate advantage, and that she derived great gain therefrom. He prays for judgment against the said plaintiff and her surety on the bond, for interest and damages, &c.

The inferior court set aside the injunction, and ordered the property seized to be sold according to law; and from this judgment, the plaintiffs have appealed.

By admissions of counsel contained in the record, it is established that William Sowell was appointed tutor to the children of Joshua Lizenby on the 25th of March, 1835; that the plaintiffs were legally separated in property, by a judgment rendered on the 12th of June, 1841, in which the wife recovered \$5,000, justly due her by her husband, as being the price of a tract of land belonging to her, and sold by her and her husband on the 20th of March, 1839, but the amount whereof was received by Sowell. That the act of sale recites that it is declared, that a tacit mortgage exists on the property of William Sowell in favor of the heirs of J. Lizenby deceased, for whom he is tutor. It is further admitted that the negroes named in the petition are the same mentioned and purchased by the plaintiff Mary, at the sheriff's sale, on the execution of her judgment of separation; that the necessary steps were taken to make said judgment legal by publication and otherwise; that the consideration of the note sued on, was for money borrowed by Sowell of the defendant, Cox, and appropriated to a debt he owed to Jane Lizenby as tutor to her; that the plaintiff Mary, was not present at the time of the payment of the same to Sowell; that the money borrowed upon the note, amounting to \$593, was applied by Sowell to the payment of a debt due to Jane Lizenby, a minor, from said Sowell as her tutor; that the debt was discharged by such payment; that Cox paid the notary's fees, which were reimbursed in said note; and that Jane Lizenby is now of age and married.

With this evidence before us, the defendant's counsel has contended: First, that the injunction should have been dissolved on his motion, because no such reason is alleged in the petition for obtaining the same, as is contained in art. 739 of the Code of Practice. Secondly, that the plaintiff Mary, by signing the

note and mortgage, derived such benefit from the transaction as must make her personally liable, although the money borrowed was appropriated to pay a debt of her husband.

I. This point is presented by a bill of exceptions taken to the court's overruling the motion made to dissolve the injunction, and we think the judge *a quo* did not err. It is alleged in the petition that the plaintiff Mary, was induced to sign the note and mortgage sued on, conjointly with her husband, to secure a debt not due by her, but which was due by her said husband, and that she could not legally bind herself with him, or for him in any contract for his benefit. This allegation amounts to setting up the illegality of the obligation under art. 2412 of the Civil Code, which prohibits absolutely any contract by which a married woman, whether separated in property or not, binds herself for her husband, or conjointly with him, for debts by him contracted before or during the marriage. Such an obligation would be void, as being an unlawful one, which, she states under oath, she has been induced to consent to. Taking the allegation as true on the face of the petition, the obligation might, perhaps, be considered as one of those which, having been obtained by unlawful means, are provided for in the 6th paragraph of the article relied on. But here the injunction was applied for according to the rules pointed out by § 5, sect. 4, chap. 2, art. 1 of the Code of Practice, from arts. 296 to 309, among which, art. 303, provides for the granting of injunctions in all cases in which it is necessary to preserve the property in dispute during the pendency of the action, and to prevent one of the parties from doing any act injurious to the other; and the plaintiff Mary, gave a bond accordingly, whilst such a bond is not required by article 740 of the Code of Practice. It was clearly necessary, under the issues set up by the said plaintiff, that her slaves should not be sold; and, we think, that the reasons stated in her petition were sufficient to authorize the granting of the injunction, which the court *a qua* properly refused to dissolve until the trial of the case on its merits.

II. On this question, we think the judge *a quo* did not err. It is true that if the obligation sued on, and the mortgage given to secure it, stood alone, the plaintiff Mary would not be bound to

pay the same, as under art. 2412 of the Civil Code, she was incapacitated from contracting it for the benefit of her husband, and as the money borrowed from the defendant was used for the purpose of paying a debt of her said husband; but the evidence establishes that the debt which was satisfied with the funds borrowed of the defendant, was one bearing upon the very property purchased by the plaintiff, and was secured by a legal mortgage on the said property long anterior to her own, and was to be satisfied out of the proceeds of the sale thereof in preference to her judgment. Thus, it is shown, that if the minor heirs of Lizenby had exercised their right of legal and general mortgage against the property of their tutor, the plaintiff Mary would have been compelled either to relinquish the property by her purchased at the sheriff's sale, or to pay the amount due them, unless she could show, under art. 715 of the Code of Practice, that there was other property in her husband's possession sufficient to satisfy said minors' claim; and this would have been the result of the opposition of said minors to the sheriff's paying over to her the proceeds of the sale of the property by her seized, if they had intervened in the proceedings by virtue of their right of preference, that is to say, she would have been obliged to lose the very amount sued for, and to suffer it to be paid over to them by the sheriff, unless she could have proved that the defendant had other property of sufficient value to satisfy the claim of the third opponents. Code of Practice, art. 403. It is clear, therefore, that the plaintiff Mary was benefitted by the contract sued on; that her property became thereby discharged and freed from a previous mortgage bearing upon it; and that the money borrowed was employed for her advantage. It is a principle of justice repeatedly recognized and applicable to this case, that no one ought to be permitted to enrich himself at the expense of another; and it is obvious that if the said plaintiff was to be discharged from the obligation by her contracted, she would enrich herself at the expense and prejudice of the defendant, whose money has been used for her benefit. It is well settled that when it is shown that the consideration of the obligation of a married woman, contracted conjointly with her husband, was received to her own use and benefit, and has turned to her advan-

tage, and was not a thing which the husband was bound to furnish her with, she is liable, and must comply with her contract ; (7 Mart. 488. 7 Mart. N. S. 64. 10 La. 147) ; for then, she cannot be considered as having bound herself as security for her husband, nor as obligating herself conjointly with him for a debt in which he is alone concerned. Yet, it may be true, that the debt which was extinguished with the defendant's money, was one originally contracted by the said plaintiff's husband, but it bore upon the property purchased by the wife ; said property was liable to be seized and sold in satisfaction thereof ; and her situation was not in any manner made worse by the loan obtained from the defendant. On the contrary, it was bettered, as it gave her a clear title to the property ; and as we found in *Twichell v. Andry*, (6 Rob. 407) the consideration for which she assumed to pay the debt sued on, may be fairly considered as a part of the price of property by her acquired at the sheriff's sale. It follows, therefore, that the debt was contracted by the appellant for her private benefit.

The appellants' counsel has contended that the situation of the appellee cannot be better than would be the minor Lizenby, who, if she had judgment against her tutor, and an execution issued, would have had to show, under the 403d art. of the Code of Practice, that her tutor had other property, sufficient to satisfy the said plaintiff's general mortgage. It is exactly the reverse. Under the article quoted, the plaintiff Mary, having the inferior general mortgage and being the vendee of the property, would have been bound, in order to be paid out of the price thereof, or to avoid the hypothecary action, to prove that the defendant had other property of sufficient value to satisfy the superior one. She had the affirmative of the proposition, and the proof must have been within her power. 2 Mart. N. S. 66. Here, however, nothing of this kind has been attempted, and no proof has been offered to show that the plaintiff's husband had, at the time of the loan, other property in his possession, of sufficient value to satisfy the minor's claim. If such proof had been adduced, the result of this case might have been very different.

Judgment affirmed.

Gates and another v. Legendre and Husband.

ALFRED GATES and another v. BAZALIA CAROLINE LEGENDRE and Husband.

The creditors of the husband may contest the validity of a separation of property, though decreed and even executed, when made with a view to defraud them, and they are injured thereby. C. C. 2408.

A donation *propter nuptias* given to the future wife by another than the husband forms a part of the dowry, unless there be a stipulation to the contrary. Such a donation by the future husband, does not form any part of it. C. C. 2317, 2318.

The wife has no legal nor tacit mortgage or privilege on the property of her husband, for the restitution of any donation *propter nuptias*, made to her by the latter. C. C. 2318.

The prescription of one year established by art. 1989 of the Civil Code, applies to actions by creditors for the rescission of a contract made in fraud of their rights; not to a suit by creditors holding legal mortgages, to rescind, as to them, a judgment decreeing a general mortgage in favor of the wife on the property of the husband, for the reimbursement of a donation *propter nuptias* made to her by the latter.

APPEAL from the District Court of East Baton Rouge, *Johnson, J. G. S. Lacey*, for the plaintiffs. A marriage contract creates no mortgage. 2 La. 538. 4 La. 556, 559, 562. 11 La. 23, 28. 16 La. 272.

Elam, for the appellant. The action is prescribed. Civ. Code, art. 1989. *Rivas v. Gil*, 8 Mart. N. S. 674.

SIMON, J. The defendant B. C. Legendre, who is a married woman, separated in property from her husband, having been sued as the third possessor of certain property on which the plaintiffs pretend to have a judicial mortgage, is appellant from a judgment giving effect to the said judicial mortgage, and which orders said property to be seized and sold to satisfy the plaintiffs' claims against their principal debtor, B. C. Legendre's husband.

The petition alleges that the plaintiffs are judgment creditors of Raphael Legendre, and that after having issued sundry executions against him, by which small credits were obtained on the amount due, the last execution was returned *nulla tona*, no property being found to satisfy the same. They further state, that after said judgments were recorded, so as to operate as judicial mortgages on their debtor's property, the wife of the latter obtained a judgment of separation against him, *with a gene-*

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ral mortgage on all his property, to take effect from the 1st day of March, 1832, upon which she caused an execution to issue, and under the same, purchased the property described in the said petition; that the judgment so obtained by the defendant B. C. Legendre, is fraudulent and collusive, and also illegal in allowing a mortgage and privilege from the time therein mentioned, and because the marriage contract on which it is based never was recorded, and was intended to defraud her husband's creditors. They represent that at the time of the purchase by the wife, they had *a lien* on the property; that it was legally *mortgaged* and *hypothecated* for the payment of said judgments; and that they have a prior and better right to the same than the said defendant, &c.; and they pray that the marriage contract between the said defendant and her husband, be declared null and of no effect; that the mortgage allowed by the judgment of separation be also declared illegal and void, and be erased as to the petitioners; that the judicial mortgage claimed by them be decreed to be valid and binding on the said property, from the time it was recorded; that the defendant B. C. Legendre be ordered to give up the said property by her purchased, or to pay the amount due to the plaintiffs; and that if she should fail to do so, that the same may be seized and sold to satisfy said judgments, &c.

The defendant B. C. Legendre, being an absentee, was represented by a curator *ad hoc*, who joined issue by first denying Raphael Legendre's indebtedness to the plaintiffs, and by setting up the prescription of one year against their demand. He further sets up the wife's title to the property under the sheriff's sale, alleging that the proceeds of said sale have been credited on her execution, without any legal interference from the plaintiffs; that, as the purchaser of property at a sheriff's sale, she acquired the same free from any mortgage or other rights of the plaintiffs. That, by virtue of the marriage contract duly recorded, said defendant B. C. Legendre, became on the 1st of March, 1832, a creditor of her husband to the amount of \$2000; that about four months after the marriage contract was passed, her husband was the owner of the house and lot described in the petition free from any incumbrance, which property became

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from that time legally mortgaged to secure her demand; and that having been legally seized and sold to satisfy the same, she cannot be interrupted in the enjoyment of her rights by the plaintiffs' demand, &c.

Although the pleadings appear to base the respective pretensions of the parties to this controversy upon various legal points which have been urged and relied on in the argument by their counsel, the only real question which this case presents for our investigation, is whether B. C. Legendre ever acquired by virtue of her marriage contract any legal mortgage on the property of her husband, as security for the amount therein stipulated to have been established by R. Legendre as the dowry of his future wife, and which he binds and engages himself to pay, so as to prejudice the rights of said Legendre's subsequent creditors?

The stipulation contained in the marriage contract, and relied on in support of the judgment of separation of property complained of by the plaintiffs, is in these words: "and the said Raphael Legendre, Esquire, has established as the dowry of his future spouse, the sum of \$2000, to be recovered out of his estate real and personal, which he binds and engages to the payment of the dowry." This marriage contract was recorded on the 6th of August, 1832, and is the basis of the preference which the defendant B. C. Legendre claims on the proceeds of the sale of the property on which the plaintiffs subsequently acquired their judicial mortgages.

The evidence establishes that the plaintiffs' judicial mortgages, as resulting from the recording of their judgments, have effect from the 19th of February, 1840, with regard to three of them recorded on that day, and from the 12th of July, 1843, with regard to a fourth judgment recorded on that day. The suit for a separation of property was instituted on the 6th of September, 1842; the judgment rendered therein was signed on the 28th of January, 1843; and the sheriff's sale of the property described in the plaintiffs' petition, was made on the 3d of June ensuing, for the sum of \$1585, to the defendant, which amount was credited on the writ, as so much received in part satisfaction thereof. The judgment of separation allows to the wife a

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general mortgage on her husband's property, to take effect from the 1st of March, 1832.

It cannot be controverted that the creditors of the husband may object to the separation of property decreed and *even executed*, with a view to defraud them, (Civil Code, art. 2408,) and that they may subsequently complain of such judgment of separation, in cases in which their rights may be injured thereby. 13 Toullier, Nos. 89, 90, and following. Favard, Verbo Separation entre Epoux, sect. 1, § 2, No. 12. And Delvincourt, vol. 3, p. 26. "Si ils prétendent que la séparation ne devoit pas avoir lieu, et si, en supposant la séparation admissible, ils prétendent que la liquidation des droits de la femme a été faite d'une manière préjudiciable aux intérêts de leur débiteur;" &c. It is, therefore, clear, that the plaintiffs cannot, under this positive provision of our law, be precluded from enquiring into the grounds upon which the judgment obtained by the wife may be based; and that, particularly under the allegations of fraud and collusion, they have a right to contest the legality of such judgment, when used by the wife to defeat the rights which they may have acquired against her husband. 4 La. 421. 7 Mart. N. S. 460. 8 *Ib.* N. S. 459. 1 La. 373.

Now, the judgment of separation which is attacked in this action, and under the protection of which the defendant B. C. Legendre claims the property on which, the plaintiffs pretend to have their judicial mortgages, allows her a general mortgage on her husband's property, to secure the payment of the sum of \$2000, which the latter never received in the right of his wife, but which is the amount of a promise to pay, on his part, out of his estate, real and personal, as a dowry established by him in favor of his wife in their marriage contract. This sum, which is considered by the defendants' counsel as a donation *inter vivos*, but which is rather in the nature of a disposition that cannot have any effect until the dissolution of the marriage, being due by the husband out of his real and personal estate, cannot, under the positive provisions of our laws, be taken as forming any part of the dowry, or *dot* brought by the wife to the husband, to support the expenses of marriage. Our Code is express upon this subject. It declares, in art. 2317, that "*by dowry is meant*

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the effects which the wife brings to the husband to support the expenses of marriage ;” and in art. 2318, that “ *whatever in the marriage contract is declared to belong to the wife, or to be given to her on account of the marriage by other persons than the husband, is part of the dowry, unless there be a stipulation to the contrary.* Thus, it is even clear that, if instead of a promise to pay, which is the only extent of the stipulation under consideration, B. C. Legendre’s husband had given her *in specie* on the day of the marriage, *or in property*, the very amount which was allowed her by the judgment of separation, it could not, under the terms of our laws, be considered as forming any part of the *dot*, particularly as such *dot*, *which can be settled either by the wife herself, or by her father and mother, or other ascendants, or by other relations, and even by strangers*, cannot be settled by the husband, who receives it *to enjoy the same as long as the marriage shall last.* Civil Code, arts. 2321, 2327. This doctrine, which appears to be peculiar to our legislation, has often been recognized by this court, which has uniformly decided that no legal or tacit mortgage results to the wife from a donation *propter nuptias* ; and the reason is, that such donation when made by the husband in the marriage contract, is, by the terms of art. 2318, excepted from those which are declared to form a part of the dowry ; and, it matters not, therefore, under our Code, whether proof is furnished by the wife that the state of her husband’s affairs at the time of the donation was such as to permit him to make it without prejudice to his creditors. So, in the case of *Mercer v. Andrews*, 2 La. 538, which was decided under the Spanish law, this court held that the whole doctrine contained in our Code, appears to be opposed to the existence of such a hypothecation. In the case of *Cable v. Coe et al.* 4 La. 556, a similar doctrine was entertained, under the Code of 1808 ; requiring, however, that it should be shown that the state of the husband’s affairs at the time of the donation had authorized it. But in the case of the *Union Bank v. Slidell*, 11 La. 28, decided under our actual legislation, we did not hesitate to say that, with respect to the mortgage resulting from a donation *propter nuptias*, we must assume as an undoubted principle, that no mortgage exists, except in the cases expressly authorized by law ; and in the case of

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Flores v. Lemée, 16 La. 272, we declared in positive terms that a donation *propter nuptias*, by the husband to the wife, makes no part of the latter's dowry ; and that as the wife's mortgage on her husband's property exists only for the restitution of her dotal effects, (Civil Code, arts. 2355, 3287,) and in certain cases for the reimbursement of her paraphernal funds, (*Ib.* art. 2367,) the plaintiff was not entitled to claim the right of privilege and lien on the property of the succession, as by her prayed for. We cannot but adhere to a doctrine which appears so consonant with the positive letter of the law ; and we must say that the defendant was not entitled to a legal mortgage upon her husband's property, to secure the payment of a sum of money which he never received from, or for her, but which he only promised to pay as a donation *propter nuptias*.

This view of the principal question, precludes the necessity of examining any other. As to the plea of prescription, we think it is not applicable, as this case cannot be considered as a revocatory action. Although fraud and collusion are alleged against the marriage contract and the subsequent proceedings, such allegations go rather to the effect of the stipulation therein contained with regard to the husband's creditors, than to the actual intention of the parties at the time of making the donation, and may be opposed by the subsequent creditors of the donor, who are to suffer from it. 7 Mart. N. S. 460. Toullier, vol. 13, No. 90.

Judgment affirmed.

WILLIAM W. ROSE v. WILLIAM MATHEWS.

APPEAL from the District Court of St. Helena, *Jones, J.*

McHenry, for the plaintiff,

Sheaf, for the appellant.

MARTIN, J. The plaintiff, overseer for the defendant, claimed \$1000, with interest, for his wages during one year, under an agreement between the parties, he having been discharged without cause, before the expiration of the year.

The claim was resisted under the plea of the general issue,

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and an allegation that the plaintiff was guilty of mismanagement, fraud, and misrepresentation, which justified his dismissal. The defendant claimed in reconvention the sum of \$500, the price of one of his slaves sold by the plaintiff, and \$500 for money had and received.

The plaintiff had judgment for \$250, for three months wages previous to his discharge. The defendant appealed, after an unsuccessful attempt to obtain a new trial. In this court, the plaintiff and appellee has prayed for the amendment of the judgment, and for the full allowance of his claim.

It appears to us that the court did not err. There may not have been sufficient reason for his dismissal, but he afterwards assented thereto. The defendant has not established his plea in reconvention.

Judgment affirmed.

PHILEMON THOMAS v. HENRY KEAN.

After the argument has commenced no further evidence can be introduced, but by the consent of both parties. C. P. 484.

Where a bill of exceptions is insufficient to enable the court to test the correctness of the decision of the inferior tribunal, its judgment will be presumed to have been correct.

Where it does not appear from a paper offered in evidence, purporting to be a copy of an authentic act, that the original was signed by two witnesses, it cannot be admitted in evidence as the copy of an authentic act. An act is not authentic which wants the signature of either of the witnesses required by article 2231 of the Civil Code.

One holding under a vendor who sells only his right and title to the property, cannot plead prescription.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

GARLAND, J. The plaintiff claims two hundred acres of land as belonging to him, being part of a larger tract situated on Ward's creek, of which he alleges the defendant has taken possession, and that he sets up title thereto. The defendant, in his answer, after a general denial, says that he is not in possession of any land belonging to the plaintiff, nor that ever did belong

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to him ; but that he is in possession of one hundred acres of land, purchased at the sale of the estate of one Denham, which rightfully belongs to him. He set forth his claim of title as derived from one John West, by an assignment of whose settlement right the plaintiff got the land confirmed to him. The defendant pleads the prescription of ten years, by virtue of possession in him and those under whom he claims. In a supplemental answer, he sets up the loss of a deed from John West, to one Fountain Nash Mason, which forms one of the links in his chain of title, for the purpose of enabling him to give parol evidence of its contents.

The evidence in the case shows, that John West, on the 23d of July, 1819, sold to William Hood, "a certain improvement on the east fork of Ward's creek, on condition, that if said Hood shall obtain a title for said land from the government of the United States, he binds himself to pay or deliver to John West, one hundred acres of said land, exclusive of the improvements now made by William Hood and Charles Powers, in any part that the said West may choose." This sale was recorded in the parish judge's office, on the 23d of September, 1826, at the request of the plaintiff, and the original was returned to him, it being an act *sous seing privé*. On the 21st July, 1822, William Hood and the plaintiff entered into an agreement, by an act under private signature, which stipulates that the former had sold to the latter the tract of land on which he (Hood) resided, on the east fork of Ward's creek, called West's improvement ; the whole tract containing six hundred and forty acres ; "one hundred acres is reserved for West ;" and for the balance, Hood binds himself to transfer the certificate of confirmation as soon as it can be obtained from the United States commissioners. This act was signed by two witnesses, who on the 7th February, 1823, appeared before the parish judge, and on oath acknowledged their signatures, and declared, "that the parties to said act did declare that it was their own act for the purpose therein set forth." This acknowledgment was attested by the judge, and the act recorded the same day. With this act from Hood, the plaintiff presented himself to the land commissioners of the district, to whom the claim of Hood and Gurley, founded

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on West's *improvement*, had been previously presented, and upon it, and the admission and assent of Gurley that the transfer was correct, a certificate of confirmation was issued in the name of the plaintiff, in June, 1823, without any condition or qualification; and directions were given as to the manner the claim shall be surveyed and located. It was accordingly surveyed and located in the name of the plaintiff, and represented on the township map; but at what particular period is not proved. On the 27th of August, 1823, the plaintiff entered into a penal obligation with William Nash, the condition of which states, that he had agreed to sell him, all his right and interest in and to two hundred acres of the land on Ward's creek, known and obtained by virtue of John West's improvement, and that he is to make such a title as the government shall make to him, whenever Nash shall pay the price. The tract is to have eight acres front on the creek by twenty-five deep, and is to be bounded on the upper side by the tract of Charles Powers. Subsequently this land was seized by the sheriff, under an execution against Nash, and he bought it on twelve months credit. In the sale it is described as being bounded on the north by Powers, and the same purchased of the plaintiff. This was in February, 1824. On the 2d day of September, 1826, at a probate sale of the property of William Nash, the plaintiff purchased all the right, title, and interest of said Nash in and to the tract of land of two hundred acres on Ward's creek, the title being founded on the improvement of John West, adjoining the land of Pyburn. A small portion of the price was paid in cash, and the remainder retained by the purchaser to go in discharge of so much of the claim as the purchaser had against Nash's estate.

This statement contains all the documentary evidence on the part of the plaintiff; and it may be here remarked, that according to the agreement to sell, made between the plaintiff and Nash, the two hundred acres of land were situated on the northern or upper part of the tract, and included the land in controversy, but from the description in the probate sale, the land purchased by the plaintiff is on the southern or lower part of it.

The documentary evidence offered by the defendant, is an adjudication made at a probate sale of the estate of Fountain

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Nash Mason to Hippolyte Lanone, on the 18th of August, 1829, "of all the right, title, and interest of the deceased, in and to a certain tract of land situated on Ward's creek, containing one hundred superficial acres, being a part of a section of land of six hundred and forty acres, transferred by William Hood to Philemon Thomas, with the reservation of the hundred acres as described above, which was sold by John West to Fountain Nash Mason." On the 25th of January, 1830, Lanone, by an authentic act, sold to Shields, all his rights to a "parcel of land on Ward's creek, containing one hundred superficial acres, being part of a section known as West's improvement," which tract was acquired at the sale of the estate of F. Nash Mason, as will more fully appear by the adjudication. On the 25th of January, 1836, Shields, by an authentic act, sold and transferred with a warranty, to R. M. Denham, the same parcel of land, describing it in the words of the deed to him, which is specially referred to. On the 29th of March, 1841, at the probate sale of Denham's estate, the defendant became the purchaser of a tract of land "containing one hundred superficial acres, situated on the east fork of Ward's creek, bounded by lands of A. Adams below, those of the widow Powers above, west by lands of the widow Lobdell, and east by those of Gen. Thomas," the plaintiff. Under this sale, the defendant took possession of the land in controversy. In none of the previous acts of sale under which the defendant claims, is there any specification of the boundaries of the one hundred acres claimed by him. They include the land in controversy, and the sale is unconditional. In addition to the uncertainty in this chain of title, there is no written act of sale from John West, or any other person to Fountain Nash Mason, deceased. This defect is supplied by parol testimony, admitted under the allegations in the supplemental answer. Judge Tessier says, "that at the request of William Nash, he made a private act of sale from him to Fountain Nash Mason, who was then a minor, of a hundred acres of land reserved out of a larger tract of land, an improvement derived from West, in case it should be confirmed. Saw the act after the death of Nash, and Fountain Nash Mason. He searched in his office for it, but could not find it, after their death. He

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searched for it deligently among the loose papers in his office, but could not find it. It was not recorded. It was 18 or 20 years since, he does not recollect the exact year. Nash did not wish it recorded. It was signed by the parties. He thinks, that it was before 1826, that he wrote the act." Bryan says, "that he saw a paper in the judge's office—a loose sheet of paper, purporting to be a sale of one hundred acres of land, from John West to Fountain Nash Mason, and believes that, at the time, he made them out a copy of it. Knows nothing of its loss. Has never seen it since. He understood it to be the hundred acres of land which West reserved in his sale to Hood. It was sometime since 1830, and since the death of William Nash and F. Nash Mason, that he last saw the act, when he took a copy of it in Judge Tessier's office, at Judge Tessier's request. Has no recollection that he made more than one copy of said act. Does not recollect the signatures, or whether he saw the name of John West more than once. He copied the paper shown him, mark T, and also another which purported to be a sale from West to Nash. He understood from the act of sale, that it was for the 100 acres which West reserved when he sold or conveyed the tract to Hood. Fountain Nash Mason was understood to have been the natural son of William Nash." Mr. Patterson says, he searched diligently with Judge Tessier, for the act of sale from John West to Fountain Nash Mason, and could not find it. The search was made in the office of the judge.

Mrs. Hill swears, that the hundred acres of land reserved in favor of West, lay in the north west corner of the tract adjoining Powers, and takes in the improvement of West. That a drain that runs between the improvement of William Hood and John West was the conditional line between them, as told to her by Hood. The plaintiff told her, that he sold to William Nash that part of the section that took in the improvement of William Hood: and Nash told her he intended to purchase the hundred acres from West, for his son Fountain M. Nash, after he had purchased the improvement from Thomas.

Pyburn says, that he knows the section of land known as West's improvement, and knows where the improvements of Hood and Nash were situated on it. Hood was situated inside

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of where Adams' field now is. West's improvement was about half way from Pyburn's to Powers line. It was on the west side of the section, about 200 yards above Hood's, and about 400 yards from Powers' line. The improvement of West was about 150 yards from where the defendant's house now stands. Both Hood and West have often told him, that a large beech near the creek was the line between their land. Nash's improvement was nearly between West's and Powers' line. He says that John West, under whom the defendant claims title, was then in the court-house.

We have stated the evidence very fully, and as accurately as possible from the manner the record has been made up; the evidence given on the two trials, having been improperly copied and mixed together, so as to make it difficult to understand precisely what was used on the last trial. There was a judgment in favor of the defendant, and the plaintiff has appealed.

Before proceeding to the merits of the case, our attention has been directed to certain bills of exception. The first is to the opinion of the court refusing to permit John West to be examined as a witness for the defendant. He had had him summoned, but did not offer him as a witness, and the counsel for the defence closed their testimony. The counsel for the plaintiff then asked a witness if West was not then in the court-house, who answered affirmatively, whereupon the plaintiff's counsel closed their evidence also, and it was so entered on the record. At some period subsequent to this, but at what precise time the bill does not state, the counsel for the defendant tendered West as a witness. He was objected to by the counsel for the plaintiff, on the ground that the defendant had closed his evidence. The court sustained the objection, and the defendant excepted. The bill does not state whether the argument had commenced or not. If it had, article 484 of the Code of Practice says, that "no witnesses can then be heard, nor proof introduced, except with the consent of all parties." In the absence of any negation in the bill that the argument had commenced, we must presume that it had, otherwise the judge would, we suppose, have admitted the witness to testify, if he were competent, or not objected to for some sufficient reason. When bills of ex-

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ception do not sufficiently state the grounds of exception, so as to enable us to test properly the correctness of the opinions of the judge below, we must presume that he decided correctly.

The next bill states, that the plaintiff offered in evidence the adjudication to him at the probate sale of William Nash, which was objected to by the defendant's counsel, on the ground that it was not a copy of an authentic act, as from it the original did not appear to have been signed by two witnesses, nor to have been clothed with the formalities of an authentic act. These objections were overruled, and the exception taken. We think the court erred in admitting this copy in evidence as being authentic. Article 2231 of the Civil Code says, that an authentic act is one which has been executed before a notary public, or other officer authorized to execute such functions, in presence of two witnesses, free, male, and aged at least fourteen years, or three witnesses if the party be blind. This court in 8 Mart. N. S. 502, and 11 Mart. 243, have said that an act is not authentic, that wants the signature of either of the witnesses. From the copy produced two witnesses are named in the body of the act as being present, but only one signed his name.

By the sale from West to Hood, the whole section was transferred to the latter; and upon a certain contingency, to wit, that of a title being obtained from the United States, he was to deliver to West one hundred acres in any part he might choose, so that he did not interfere with the improvements made by Hood or Charles Powers. The plaintiff became possessed of the whole tract by the sale from Hood, subject to the same reservation; but in the confirmation by the United States to the plaintiff, which completed his title, nothing is said of a reservation, and the claim to it rests upon the previous agreements. That West had a right to select one hundred acres out of the section after it was confirmed, is undeniable; but the question is, did he ever do it? We see no sufficient evidence in the record to convince us that he ever did. It is not shown that he ever called on the plaintiff to deliver him the one hundred acres, nor that he ever had it surveyed by any one. He continued to live at the same place, subsequent to the confirmation, that he occupied before; and nothing is proved as to the position of the

beech tree, and the *drain* said to have been fixed on as boundaries, to enable us to say whether more or less than one hundred acres are comprised within such limits. The surveyor, who, under the order of the court, ran out the boundaries claimed by the defendant, says, that he does not know whether more or less than one hundred acres are included in them, as he made no calculation of the quantity, not being instructed to do so. It is further to be observed, that the plaintiff has never admitted these boundaries to be correct, or to have been established with him. Their existence rests upon the statements of Hood, who had no right, after he had sold to the plaintiff, to fix them; and and it is not probable that he fixed them before, as he had sold to the plaintiff before the contingency occurred upon which West had the right of making a selection. The evidence of Pyburn further shows, that no selection was made, as the settlement of Nash was on the land now claimed by the defendant, it being between the improvement of West and Power's line, which is within the boundaries spoken of by Mrs. Hill. Our impressions are further confirmed, as to the want of any selection by West, from the absence in all of the deeds of any statement as to any particular location of the one hundred acres. It is not mentioned in any conveyance, except that under which the defendant immediately claims. Besides this, no one ever sold this reservation with a warranty, until Shields sold to Denham, in 1836.

We are of opinion that the penal bond which the plaintiff gave William Nash, did not divest him of his absolute title to the two hundred acres agreed to be sold. No title or sale by authentic or private act was to be made, until the price was paid, which never was done, so far as we are informed. It was an agreement to sell when a price should be paid; but as the plaintiff seems to have considered it in a great degree binding, and undertook to re-acquire the land by purchasing it again, it is possible, that he may have received a portion of the price, and thus have made the obligation to sell more onerous and binding.

On the part of the defendant, the evidence of the loss of the deed to Fountain Nash Mason is very weak; and as to who the

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deed was signed by as vendor, the two witnesses contradict each other; and some of their statements show that their recollection is very indistinct. Judge Tessier says that he wrote the deed, and that William Nash was the vendor, and Mason the vendee, who was a minor. He has seen the act of sale since the death of both parties, but cannot now find it in his office. Bryan, the other witness, says that the sale was from West to Fountain N. Mason, and he "believes that, at the time, he made a copy of it for them." Sometime since 1830, and since the death of both Nash and Mason, he last saw the act, and then made a copy of it in Judge Tessier's office, at his request. If the statement of Judge Tessier be true, it is not shown what has become of the sale from West to William Nash, nor whether one ever existed. The defendant claims West's reservation, and shows no deed from him to William Nash, who, the witness says positively, conveyed to Mason by a deed never recorded. If Bryan's statement be correct, then, at least, one, and probably two copies of the act have been made; and it is not shown that they have been lost. No inquiries appear to have been made of any of those under whom the defendant claims, to ascertain whether they, or their representatives have, or have not the original act, or a copy, which would be better evidence, in case of the loss of the original, than the vague recollections of witnesses, who are called on to state what occurred 18 or 20 years ago.

As the case is now presented to us, we are not satisfied with the judgment given below, and, we think, that the ends of justice will more probably be obtained by remanding it for a new trial.

As to the plea of prescription, we are of opinion that it cannot avail the defendant. None of the sales previous to that from Shields to Denham, dated in 1836, are acts translativ^e of property. They are sales of only the right and title of the various vendors to an uncertain thing, which we have held not to be a basis for the plea of prescription. 3 Rob. 220.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and the case remanded for a new trial, with directions to the judge to conform in the trial thereof, to the prin-

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ciples herein mentioned, and otherwise proceed according to law ; the defendant paying the costs of this appeal.

Elam, for the appellant.

Paterson and *Brewer*, for the defendant.

LOUISA FELPS v. THE COMMISSIONERS OF THE CLINTON AND PORT HUDSON RAIL ROAD COMPANY.

A purchaser at a sheriff's sale, made on twelve months' credit, under an execution in the name of the liquidating commissioners of an insolvent corporation, against one of its debtors, cannot tender to the sheriff in payment or compensation of his bid, an obligation of the company. If he refuse to pay the price, or to offer the proper sureties, the sheriff must expose the thing seized to a second sale. C. P. 689.

APPEAL from the District Court of East Feliciana, *Johnson, J.*
GARLAND, J. The Commissioners of the Clinton and Port Hudson Rail Road Company, obtained an order of seizure and sale, on a mortgage given by Nathan Edwards and wife, on a tract of land and several slaves, to secure a certain number of shares in the Company, which also had banking privileges, on the faith and credit of which shares, M. Edwards had obtained a loan of \$1200, payable according to the provisions of the charter. The property was advertised for sale for cash, and there being no bidders to the amount of two-thirds of its appraised value, it was again offered for sale on a credit of twelve months ; the purchaser to give a bond and security as required by law, with a mortgage on the same. At this sale Louisa M. Felps became the highest bidder, and the property was cried off to her, for \$1275. Upon being called on to comply with the conditions of the sale, she tendered to the sheriff two certificates of deposit, one given by the Company on the 31st July, 1838, and the other on the 15th of July, 1841, on which certificates the sum of \$1117 44 was due on the day of sale, the sum coming to the plaintiff in execution being \$1049 36. Her attorney insisted that these certificates should be received in pay-

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ment, and demanded a deed for the property, which the sheriff refused to give ; and she thereupon took a rule on him and the plaintiffs in the order of seizure and sale, to show cause why the certificates should not be received in payment or compensation of the sum bid, and a deed executed according to law. In addition to these facts, it was shown on the trial of the rule, that the Clinton and Port Hudson Rail Road and Banking Company was insolvent ; that its charter had been declared forfeited in conformity with the acts of the legislature ; that its affairs were in a course of liquidation by the Commissioners ; and that its certificates of deposit were worth at the time of the sale, about thirty-seven and a half cents on the dollar. It was admitted on the trial, that Mrs. Felps had only become possessed of the certificates of deposite a short time before the sale, and proved that there was a debt in favor of the State, secured by a pledge, or mortgage on all, or nearly all the property of the corporation.

The court made the rule absolute, and ordered the sheriff to receive the certificates of deposit and make a conveyance to Mrs. Felps, from which judgment this appeal has been taken.

We have not been referred to any law, nor have we been able to find any, which authorizes a purchaser at a sheriff's sale, made for cash or on a credit of twelve months, to tender to the sheriff in payment or compensation of his bid the obligations of the creditor, when it is shown that he is insolvent, and the execution is in the name of his syndics or other legal representatives, unless it shall be found in the statute hereinafter mentioned. Nor have we been shown any law that authorizes such a mode of payment, or compensation, where the creditor in the execution is solvent, and no privileges or rights of third persons are to be affected thereby. Article 689 of the Code of Practice establishes as a general rule, that "if the person to whom the property has been adjudged, shall refuse to pay to the sheriff the price of the adjudication, or to offer the proper sureties when the sale has been made on credit, the sheriff shall expose to sale anew the thing seized, and adjudge it to another person." This is a plain rule, and we can easily foresee the embarrassments that might arise by a departure from it, and we cannot do it

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unless directed by law. In many cases the plaintiff in execution would be much delayed, as the sheriff is not legally competent to judge upon the demand in compensation. When the sale is for cash, no debt is created between the parties, the money is demandable and payable as soon as the adjudication is made. If the sale be on a credit, and a twelve months' bond be given according to law, we will not say now, whether the obligors in it might, or might not, plead compensation, if a proper case be made out between them and the obligee in it.

The counsel for the plaintiff in the rule has referred us to the acts of the legislature of 1843, p. 56 and 63; also to the case of *The Commissioners of the Exchange and Banking Company of New Orleans v. Mudge and another*. 6 Robinson, 387, 397. We have carefully examined these acts, and our decision in the case mentioned. The first section of the first act relied on has no application to the case. It is confined in its provisions to stockholders alone. The second section is the one relied on, and is the one under which we decided the case cited. It says, that whenever any person shall be indebted to any liquidating bank for any stock, loan, or otherwise, and shall tender to such bank the bonds of the State issued in favor of that bank, they shall be a legal offset; and said bank shall at all times receive in compensation of debts due to it, their own debts when liquidated and past due, whether for circulation, deposits, or any thing else. We carried this law into effect, in the case against *Mudge et al.*, because they were sued on an obligation entered into before the bank went into liquidation, but falling due subsequently. They were the debtors of the corporation on a contract made with it, and not under a new obligation entered into with the Commissioners. The plaintiff in this rule was never the debtor of the Port Hudson Bank and Rail Road Company, so far as we are informed. Her contract was made with the Commissioners of liquidation, and she has no more right to offset the obligations of the Company or bank in discharge of it, than the purchaser of property at a sale made by syndics has to pay the price in the obligations of the insolvent.

It is, therefore, ordered and decreed, that the judgment appealed from be reversed and annulled; and it is further ordered

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that the rule on the sheriff and Commissioners be discharged; the plaintiff therein paying the costs in both courts.

Lyons, for the plaintiff.

A. M. Dunn and *Roselius*, for the appellants.

BARTHELEMY BOUCHE v. JOHN PIERRE MICHEL, Administrator of the Succession of Pierre Barron, deceased.

An allegation, in an action to recover a sum of money, that it was loaned to the defendant, is not supported by proof of a deposit.

Where the defendant in an action to recover a sum of money as a loan, avers that the amount was paid to him as earnest on a contract for the purchase of real estate, parol evidence will be admissible to establish the averment. It cannot be excluded, on the ground that it tends to establish a sale of real property.

APPEAL from the Court of Probates of East Baton Rouge, *Tessier, J.*

MARTIN, J. The plaintiff is appellant from a judgment which discharges the defendant from the plaintiff's claim for \$372, alleged to have been loaned by the former to the defendant's testator.

The claim was resisted on the allegation that the sum paid by the plaintiff to the deceased, was not loaned, but paid as an earnest, on a bargain between the plaintiff and the latter, for the purchase of a half lot of ground which the plaintiff desired to acquire.

The court sustained the defence and gave judgment for the defendant, and the plaintiff appealed.

The following disclosures were drawn from the plaintiff by interrogatories. He agreed with the defendant's testator to purchase the half lot, for fourteen hundred dollars. The sale was not passed, the vendor saying that he had to go to the Court of Probates first, and they then agreed that there was nothing done. Afterwards he gave him the sum claimed, *as a deposit*.

Legendre deposes, that the plaintiff told him he had made the purchase for fourteen hundred dollars, and paid on account three hundred dollars in cash and seventy in goods. The witness informed the plaintiff of the vendor's inability to make a

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title on account of his minor children, and the plaintiff replied that he would go and see the judge. He did so, and the parties agreed to delay making the title until the court met and there might be a family meeting; and he would then pay the balance of the price.

Duplantier deposes, that the plaintiff told him he had purchased the ground.

Bonsirven deposes, that the plaintiff told him (Bonsirven) he had purchased the ground. The witness accompanied the vendor when he went to offer to make a title; and the plaintiff replied that he was not ready to receive it, not being prepared to pay the balance of the price. The plaintiff told the witness that he was to give sixteen hundred dollars therefor, and had paid on account two or three hundred dollars.

Duprey deposes, that he saw the plaintiff counting one hundred and twenty-five dollars to the testator; on which he said this is three hundred and seventy-five dollars which you owe me, and the testator answered "yes" several times; requested the plaintiff to make a memorandum, and he would do the same.

Carmena deposes, that he was consulted by the plaintiff on the cost of a house to be built on the premises; and informed witness that he had bought it for about fourteen hundred dollars, near three hundred of which were to be paid in cash, and the balance on receiving the title.

The parol testimony was excepted to on the ground that it tended to establish a contract of sale of real property.

It does not appear to us that it was improperly received; the question before the court related to the nature of the bailment of a sum of money, which both parties admitted to have been made by one of them to the other, the plaintiff having averred in his petition that it was on a loan, and in answer to interrogatories, a deposit; and the defendant that it was on neither of these contracts, but on one of sale.

The plaintiff's claim being on a loan must have been supported by proof corresponding thereto; it could not be by the proof of the deposit. Admitting, however, that the averment of a deposit not having been objected to nor required to be stricken out, the plaintiff may avail himself of it, the parol

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testimony is properly admissible to show that there was neither loan nor deposit.

It appears to us that justice requires that the case should be remanded, in order to afford to both parties the opportunity of putting the facts of the case more clearly before the court.

It is, therefore, ordered, that the judgment be annulled and reversed, and the case remanded for further proceedings according to law; the appellee paying the costs of the appeal.

Burk and Herron, for the appellant.

Avery, for the defendant.

10r	94
120	280

10r	94
125	227

 P. G. MATHIAS v. JOHN LEBRET.

Where in an action by the undertaker on a building contract, there is an allegation in the petition, that "if any alteration was made in the contract, or delay occasioned, it was by the order and consent of the defendant," it is sufficient to authorize the introduction of the testimony of witnesses to prove that the contract was altered with the consent of the defendant. Such evidence would also be admissible to rebut the allegations of the defendant, that the work was not completed within the time specified in, and according to the terms of the contract.

Where a party desires to oppose the admission of the report of experts, he must object to it when offered, and except to the opinion of the court admitting it. Where this has not been done, no objection to its admission can be urged on a motion for a new trial.

One who has contracted for a building at a fixed price, will be responsible for the value of extra work, where, from the evidence, it is clear that it must have been done with his consent.

APPEAL from the District Court of West Feliciana, *Johnson, J. Lyon and Boyle*, for the plaintiff.

Hudson and Ratliff, for the appellant.

SIMON, J. The plaintiff claims of the defendant the sum of \$914 94, which, he alleges, is due him on an account filed with his petition, one item of which is the price agreed upon by the parties to a building contract, to wit, \$500; and the other items are for extra work done to the defendant's house, and for two sums of money paid by said plaintiff on two different drafts. He represents that the contract was executed in good faith on his part, and that its stipulations and conditions were performed

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according to the tenor thereof, or if any alteration was made or delay occasioned, it was by the order and consent of said defendant.

The answer admits the execution of the contract, but states, in substance, that the plaintiff having failed to comply with the terms and stipulations thereof, is not entitled to recover the price agreed on in the said contract. It farther admits that the plaintiff has done some carpenter's work for the defendant, for which he, plaintiff, had presented a bill independently of the contract, but that the same has been paid by said defendant's account against the plaintiff. He further avers that the work was not completed within the time specified in the contract, and that, therefore, he is entitled to be indemnified for the delay according to the terms thereof. He denies that any extra work was done aside from the contract, and prays that judgment be rendered against the plaintiff for the sum of \$1,350, as damages for his non compliance with the contract, and that experts be appointed to examine the work. He further prays that judgment be rendered in his favor for the amount of his reconventional demand, &c.

This case was submitted to a jury, who found a verdict in favor of the plaintiff for \$211 57; and said verdict having been adopted by the court as the basis of its judgment, the defendant, after an unsuccessful attempt to obtain a new trial, took this appeal.

The first point in controversy to which our attention has been called, grows out of a bill of exceptions taken to the opinion of the judge *a quo* permitting the introduction of a witness to prove that the contract had been changed and altered by and with the consent of the defendant; and the latter's counsel has contended that this evidence was inadmissible, as there is no allegation of such change in the plaintiff's petition. On referring to the petition, we have found an allegation that "if any alteration was made in the contract or delay occasioned, it was by the order and consent of the defendant." This allegation was undoubtedly sufficient to authorize the admission of the testimony; but if any doubt exist as to its admissibility under such an allegation, it seems to us that it was admissible at least

to rebut the defendant's allegations that the work was not completed within the time specified in the contract, and that it was not performed according to its terms and stipulations. We think this evidence was properly admitted below.

The next point, which is one of the grounds on which the defendant relied to obtain a new trial, relates to the court's permitting the report of the experts to go to the jury, which permission, it has been urged, is illegal, as the experts were not sworn according to law. Nothing in the record shows that the report or account signed by the three experts was permitted to go to the jury. It is true it was filed, and is one of the documents which comes up with the record, but we are not informed by any bill of exceptions that any objection was made to its introduction or admission as evidence, or that it was used in any manner before the jury. This should have been made a question below, when the report of the experts was offered as evidence by the plaintiff, and it was the duty of the defendant to object to its admission, and to bring the question before us by a bill of exceptions. Code of Practice, art. 487. Not having done so, it was too late to urge it on a motion for a new trial, as the want of objection thereto, gives rise to the presumption that the defendant consented to its going to the jury as evidence, and, as the case stands, we cannot notice it.

On the merits, the matters in controversy appear to have been fully investigated before the jury. The evidence, it is true, is somewhat contradictory; but how can we say that the jury came to an erroneous conclusion? They were the proper judges of the degree of credibility to be put on the declarations of the witnesses, and their verdict is also strengthened by the refusal of the judge *a quo* to grant a new trial. The facts established by the testimony of several witnesses introduced by the plaintiff, show, in substance, that all the work was done agreeably to the defendant's orders; that if the gallery was not tongued and grooved, it was at said defendant's request; that the latter said he did not care if the upper part of the house was finished in three months, so that the lower part was finished, as he wanted to use it; that various parts of the work were done by the defendant's instructions; that he stopped the plaintiff from

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working on the building to put up shelves in the store, preferring to have that done; that he took possession of the store and did not object to the work; that he took possession of the house, and has been in possession of it ever since; that, on one occasion, defendant observed to one of the witnesses, that the work was well done, and that he was satisfied with it; that, on another occasion, he said that he liked the building and the work very well, except the ceiling; that said defendant's family lived up stairs in the house, and that they lived there before the plaintiff commenced the work, and all the time that he was there at work.

On the whole, notwithstanding the contradictions, generally unimportant, which exist in the testimony, we are satisfied that the changes and alterations made in the contract, were made by the direction of the defendant, and also the execution of the extra work. He lived there, and he must have noticed the progress of the work, which was done under his own eyes. This case has some analogy to that of *Doyle v. Ryan* lately decided, (9 Rob. 402), in which a similar question was presented, and must have the same result. Here, however, the jury thought proper to reduce the plaintiff's demand from \$914 94 to \$211 57; and we cannot say that their verdict is manifestly erroneous.

Judgment affirmed.

MICHAEL SMELSER, Syndic of his own creditors v. REBECCA WILLIAMS and others.

Where a defendant swears that his principal counsel is unable to attend, as he is informed and believes, in consequence of severe illness, and that he cannot safely go to trial without him, he is entitled to a continuance.

APPEAL from the District Court of St. Helena, *Jones, J.*

SIMON, J. This case was before us in 1843, and was remanded for a new trial. 4 Robinson, 152. On the day fixed for the trial of the cause in the lower court, after the return of our mandate, the defendants moved for a continuance, on the

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ground of the absence of their principal counsel as stated in the affidavit presented, the associate counsel being also absent, and they having no counsel present. This motion was overruled, and the defendants took a bill of exceptions.

We are of opinion that the judge *a quo* erred, in refusing the continuance. The defendants' affidavit shows that John P. Bullard, Esquire, was *the principal counsel in the cause*; that he was absent, and that, as they had been informed and verily believed, said Bullard was detained and unable to attend *by severe illness*; and they further swear that *they cannot safely go to trial without him*. It is true this affidavit makes no allusion to the absence of T. Lawson, Esquire, the defendants' other counsel, who was not in attendance, and that no reason is assigned therein for said Lawson's absence; but taking the facts stated in the affidavit as true, it seems that John P. Bullard was the principal counsel entrusted with the defence of the cause, and that the defendants could not safely go to trial without him. Lawson's absence may, perhaps, also be accounted for by the very reason that, not being the principal counsel, and relying upon his associate for the defence of the cause, he did not think it necessary to attend, as he was perhaps unacquainted with the circumstance which prevented Bullard from attending to the trial. Be this as it may, we are not prepared to say that, under the circumstances of this case, the defendants were properly forced into the trial of it in the absence of all their counsel, and particularly of the one in whom they appear to have placed most confidence; and, as this court said in the case of *Barry v. The Louisiana Insurance Company*, 12 Mart. 484, "when a counsel is really prevented by indisposition from attending, the client might suffer great injury if the cause was pressed in the absence of the one of his counsel, who had taken on himself the laboring oar." See also 5 Mart. N. S. 641. 6 *lb.* 335. Here the case was tried and submitted to the court *a quâ* on the evidence already on file. No new evidence was produced by either party, except the admission of a fact exhibited by the record; and although this is a case of long standing, we think the sickness of the leading and principal counsel of the defendants, was a good ground for a continuance, and that justice

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requires it should be remanded for a new trial, in order to afford the defendants an opportunity of being represented by counsel in the defence of their rights.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that this cause be remanded to the lower court for a new trial; the appellee paying the costs of this appeal.

Sheafe, for the plaintiff.

Winter and Lawson, for the appellants.

JOSEPH STEPHENSON v. HENRY GOFF and others.

10r	99
46	677
10r	99
49	1688

Where it is shown that the boundary lines of the land claimed by one holding under a confirmation by the United States and a survey made by a government surveyor, were run as near as possible to a bar, the whole of which was subject to be overflowed at high water, and the greater part of it to an annual overflow, so as to include all the high land susceptible of ownership, the proprietor will be entitled to the alluvion, or batture, subsequently formed on the site of the bar.

A mere trespasser cannot defend himself, by alleging imperfections in the title of a plaintiff, which is apparently good.

APPEAL from the District Court of West Feliciana, *Johnson, J.*

GARLAND, J. The plaintiff claims to have possessed as owner since the year 1827, a tract of land bounded by the lands of Jesse Saunders, by vacant land, and on the front and one side by the Mississippi river, of a portion of which he alleges that Goff, Salyers and Jeter have taken possession, and that they now hold it contrary to his express wishes and warning to them. He avers that they are committing various trespasses, by cutting down and selling the wood and timber thereon. He prays for an injunction to prevent further trespasses, and that the defendants be ejected from the premises.

Goff moved to be allowed to sever from his co-defendants in his defence, which was ordered, and he answered by a general denial of the allegations in the petition. Salyers never answered at all; and the suit as to Jeter was dismissed on the motion of the plaintiff.

The evidence shows that, in the year 1827, the vendor of the

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plaintiff, claiming to have a donation claim confirmed by the United States, had it located or surveyed by a deputy surveyor of the United States, who swears that he was authorized to make it. He identifies the plat he then made. From this plat, it is shown that the upper line, which is between Saunders and the plaintiff, commences on the bank of the river; the front runs down some distance, and in consequence of a bend in the river and of its touching a flat mud or sand bar, the line was run at right angles with the river until it went back far enough to clear the bar, when it again runs down for a front, until it touches the lower part of the bend of the river and the bar that was forming. The lower line then runs along the edge of the bar, as near as practicable, making the river the side line its whole length; thence the back line runs north to a corner; thence east to the point of beginning on the bank of the Mississippi. The surveyor swears that at the time of the survey, the plaintiff was in possession of the land; but his deed is not dated until the year 1828. He says, that a part of the front was on the bank of the river; that the balance was a very low mud bar; the portion next to the main land was a very low slough; that next to the river, a little higher. This bar was not included in making up the quantity of land in the survey. The lower side line was run as near to the bank of the river as the land was susceptible of ownership. At the time of making the survey the whole bar in front was overflowed every year, at a very moderate high water. It was not considered land at all, only a bar. In making the survey the lower side line was not marked, as the river was considered the line. At a low stage of water the distance from the main land across the bar to the water was nearly half a mile. There were some ridges on the bar, or places higher than others; on these there were trees—small cotton wood and willows. He says, that it is not usual with him to include mud or sand bars in his surveys of claims. Was instructed by the Land Department not to do so. He was paid by the United States for making the survey of the claim under which the plaintiff holds possession.

There was a good deal of testimony taken both by the plaintiff and defendant to show what was the state of the bar on the

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front and side of the land in 1827 and 1828, and whether it was susceptible of ownership then. It is contradictory in some respects. Nearly all the witnesses say, that there were lateral ridges on the bar, higher than the other parts of it, and some of them nearly as high as the main land. On these were trees of considerable size. But the weight of the testimony is, that the whole bar was overflowed at high water, and much the greatest portion every year. Since the year 1828, the bar has, from the alluvial deposits, risen rapidly, has extended itself, and, for a considerable distance from the lines run in 1828, was as high as any part of the land at the time this suit was commenced. On the spot where this bar formerly existed, and outside of the lines run in 1827, the defendants Goff, Salyers and Jeter, established themselves as wood choppers. One of them in front of the tract, and the other two on the land on the side of it. They do not pretend that they have any pre-emption right, or a wish to acquire one; but contend that the possession of the plaintiff does not rightfully extend so far as he pretends, and that he cannot disturb them. He proves that he has, long before and subsequent to this suit, exercised various acts of possession on the land in the immediate vicinity of the cabins of the defendants. The Surveyor General of the United States, in the year 1844, certifies that from the public surveys on file in his office, there is on the north side of the claim under which the plaintiffs holds a strip of vacant land, which *will be* surveyed and returned as public land, it lying between the line of the tract claimed by the plaintiff and the river, which land is subject to entry by pre-emption, in the same manner as other public lands. He then proceeds to intimate a doubt whether or not the plaintiff's claim has been properly located, and suggests a possibility that the land within the lines actually run, may yet be returned as public land, and be rightfully subject to entry, for the benefit of the government, notwithstanding the survey in 1827, and the possession ever since.

The court below was of opinion that the plaintiff had not made out his case, and gave judgment for the "*defendants*;" from which the plaintiff has appealed.

From the manner in which the cause was conducted below,

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it is somewhat doubtful whether or not the case was tried as to the defendant Salyers, although the judge says, that the judgment is for the "defendants." Goff answered separately, and moved for an order that in his defence he might be severed from his co-defendants, which was entered. Salyers never appeared, and a judgment by default was entered against him; and the suit as to Jeter was dismissed by the plaintiff. The appeal was asked for in open court, and no one was cited. As the appeal bond is given to Goff alone, we shall consider him as the only appellee, and leave the plaintiff and Salyers to ascertain whether or not the judgment below applied to him.

From the testimony there cannot be a doubt that the plaintiff, in the year 1827, had possession of a tract of land surveyed by a United States surveyor, a part of the front of which, and one side line were run very close to the bar or alluvion then forming; and the main question in the cause is, was the land on which Goff has fixed himself susceptible of ownership or occupation at the time when the lines of the plaintiff were run? If it were and the lines were not extended so as to include all the high land, the plaintiff cannot now claim the batture which has formed adjoining the main land. The evidence satisfies us that the claim under which the plaintiff alleges possession was located as near to the bar and alluvion forming as it could be. The surveyor is positive in his assertion, that the lines were so run. He says that the side line was not marked at all, as he considered the river the boundary. This being the case, we think the plaintiff is entitled to the possession of the batture formed adjoining his land since his survey. This case is very similar to that of *Bonis et al. v. James et al.*, decided in March last. If the United States intend to disregard the location and survey made by their own surveyor, and enter into a contest with the plaintiff, it is a matter with which we have nothing to do now. The defendant has no right to anticipate the result of such a contest, and take possession of the land in advance; nor has he a right to assume the rights of the United States, if any they have, and provoke a contest in their behalf for his own benefit. The mere statement of the Surveyor General, that from the plats in his office the land appears to be vacant, does not

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make it so ; nor does his declaration that it may hereafter appear that there has been an improper location of the confirmed claim, destroy it. We cannot countenance the idea, that because a citizen has, or may have a controversy with the United States, or another citizen actually or in prospective, in relation to his rights and title to land, that this authorizes any one to take possession of it, and when sued for so doing, to interpose those difficulties, to protect him from the consequences of an open violation of the rights of both parties.

We are of opinion that the judgment in favor of the defendant is erroneous, and ought to be reversed.

It is, therefore, ordered and decreed, that the judgment appealed from be annulled and reversed ; and it is further ordered and decreed, that the plaintiff, Joseph Stephenson, do recover of the defendant Henry Goff, the possession of the land claimed in his petition, and be quieted therein ; the defendant paying the costs in both courts.

Ratliff, for the appellant.

Ivor, for the defendants.

AZEMA DUPLANTIER, Tutrix of her Minor Children v. FRANCIS D. NEWCOMB and another.

The defendant purchased from the plaintiff a tract of land and certain shares of bank stock. The land, and a number of slaves on it belonging to the plaintiff, were mortgaged to secure the payment of the stock, on which the latter had obtained a loan from the bank. Defendant agreed, as the price of the property, in addition to the payment of a certain sum, to assume the payment of the loan obtained by the plaintiff, and to release the mortgage of the bank on plaintiff's slaves. In an action by plaintiff on notes given for a part of the price, defendant claimed a diminution of the price, on account of a deficiency in the quantity of land sold of more than a twentieth. *Held*, that if the bank stock was of any value to the defendant, its value should be deducted from the whole price before proceeding to fix the ratio of diminution, and that the value to the plaintiff of the release of the mortgage, if capable of being estimated, should be added to the price ; that the burden of proving the value of the stock to the defendant, was on the plaintiff ; and that the proof of the value to the plaintiff of the release of the mortgage, was on the defendant.

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APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

GARLAND, J. This suit is brought to recover the amount of two promissory notes, each for the sum of \$1608 33, with interest at ten per cent per annum against the drawer, and five per cent per annum against the endorser, from the 4th of December, 1837, on one note, and from the 4th day of December, 1838, on the other. The notes are drawn by Newcomb and endorsed by Harney, and are secured by a mortgage on a tract of land and certain slaves, which mortgage is prayed to be made executory.

The defence is, that the notes were given to secure a part of the price of a tract of land situated in East Baton Rouge, which was sold at the probate sale of the late Guy Duplantier, deceased, in December, 1835, and purchased by the defendant Newcomb. The land was sold as two connected tracts, one having six *arpents* front on the river Mississippi, by a depth of forty *arpents*, and the other a tract of an irregular form in the rear, represented as containing six hundred and twenty-four superficial *arpents*; the whole making eight hundred and sixty-four superficial *arpents*. The answer then proceeds to allege that the said Guy Duplantier never had, and that his legal representatives could not sell that quantity of land. That there is a deficiency in the quantity of more than one-twentieth, to wit, of more than one hundred *arpents*; wherefore the defendants pray for a diminution in the price, in the ratio of the price given, which they say amounts to a large sum, which they are entitled to have deducted from the amount of the notes sued on.

The deficiency complained of is in the rear tract, and is very clearly made out by the testimony. The court ordered a survey to be made, and instead of six hundred and twenty-four *arpents* of land, only five hundred and eighteen and fifty-one hundredths *arpents* were found. There is also other evidence in the record, showing the deficiency in the quantity. The witnesses state that the lines of the rear tract of land are very distinctly marked. A connected plat of this tract and several others adjoining and near to it, made by André Lesage, former parish surveyor, was given in evidence, which also shows a diminution in the quanti-

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ty of the land. On it the tract is represented as containing five hundred and eleven and ninety-one hundredths *arpents*, which is less than the present parish surveyor makes the quantity to be.

With the tract of land Newcomb also purchased two hundred and twenty-five shares of stock in the Union Bank of Louisiana, which subjected the whole tract of land, with a number of slaves on it, to a mortgage of \$22,500, to secure the payment of the stock, and on which Duplantier had obtained a loan of \$10,125, payable in twenty annual installments. This loan which Newcomb assumed to pay, and the \$4825, payable in three installments, and an agreement to release the mortgage to the bank on the slaves belonging to Duplantier, made up the price of the land and stock. There is no evidence before us what was the value of the bank stock at the time of the sale to the defendant Newcomb, nor how much the plaintiff was benefited by the release of the mortgage on the slaves.

The court below decided that because the defendant did not prove what was the value of the bank stock at the time of the sale, no deduction should be made for the diminution in the quantity of land, and gave judgment against the defendants *in solido*, from which Newcomb only has appealed.

As to the defendant Newcomb being entitled to a diminution of the price of the land in consequence of a deficiency in the quantity, we have no doubt; but what the standard of reduction shall be, the record does not enable us to determine. The things sold were a number of *arpents* of land, and two hundred and twenty-five shares of Union Bank stock. The price was the assumption of a debt to the bank for \$10,125, the sum of \$4825 payable at a future period, and the obligation of releasing a mortgage on a number of slaves in the possession of the plaintiff, which was done. The bank stock and loan operated as a mortgage on the land; and, as a general rule, this is not considered of any advantage, but rather an onerous obligation, and the release of the mortgage on the slaves in the plaintiff's possession would also be considered, *prima facie*, as a benefit; but it may be that the bank stock was of some value to the defendant Newcomb, and worth something independently of the land. If so, that much should be deducted from the whole price, before

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proceeding to fix the ratio of diminution. On the other hand, if the release of the mortgage on the slaves, has been a benefit to the plaintiff, then the value of such release, if it can be estimated, should be added to the price, and in a measure offset the value of the bank stock.

Some discussion took place as to the party upon whom the burden was thrown of proving these matters. The judge below thought it devolved on the appellant entirely. In this he was not entirely correct. We think it devolves on the plaintiff to show of what value the stock was to the defendant Newcomb, independently of the land; and on the appellant, to show of what value the release of the mortgage on the slaves was to the plaintiff. To effect this, and thus ascertain accurately from what sum the diminution of price is to be made, it becomes necessary to remand the cause to obtain further evidence.

The defendant, Newcomb, complains that there has been an erroneous allowance of interest, and that a sum of one hundred and twenty-five dollars, endorsed as a credit on one of the notes has not been deducted in the judgment. This is not a matter of much consequence, as the cause must go to the court below again, and the errors, if there be any, can be corrected.

In the argument before this court, the counsel for the defence has urged that Harney, the endorser of the notes, has been discharged from all liability as such, in consequence of Madam Duplantier having postponed, in favor of the Union Bank of Louisiana, the mortgage in favor of the succession of her late husband, to secure the payment of the notes. The first answer to this point is, that Harney is not before us. It does not appear that he has taken any appeal, and he has not given any bond or security. He is not named as an appellant in the bond signed by Newcomb and his surety. Secondly, admitting that Harney was an appellant, no such defence as that set up for him, is presented by his answer.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and this case remanded for a new trial, with directions to the court to conform in the trial thereof to the principles herein stated, and otherwise pro-

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ceed according to law; the appellee paying the costs of the appeal.

Brunot, for the plaintiff.

T. G. Morgan and Avery, for the appellant.

ROBERT PERRY, Syndic of the Creditors of Harral J. Powell, an Insolvent, v. DANIEL HOLLOWAY.

10r	107
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10r	107
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According to arts. 683, 684 of the Code of Practice, privileges and special mortgages existing on property offered for sale by sheriffs, in favor of others than the seizing creditor and which are preferred to him, form a part of the price for which it may be sold; and it cannot be sold unless something be offered above their amount. The sheriff is required to announce that the purchaser may retain out of the price offered the amount of such privileged debts and special mortgages. The purchaser is bound to pay the previous incumbrances as a part of the price. If it turn out that a special mortgage or privilege, certified to exist upon the property, had been extinguished, or never attached, as where, in the case of a mortgage to secure against future endorsements, the endorser has never been made liable, the owner himself, or his creditors, in case of a surrender, may recover of the purchaser the amount thus erroneously estimated as a part of the price.

Where property is offered for sale by a sheriff, and he does not comply with the law requiring him to announce the privileges and special mortgages existing on it, so as to make it certain what price the purchaser understood he was to pay, the sale will be null.

The plaintiff appealed from a judgment of the District Court of East Feliciana, *Johnson, J.*, in favor of the defendant.

BULLARD, J. The plaintiff as syndic of the creditors of Powell alleges that the defendant, Holloway, is indebted to them in the full sum of sixteen thousand dollars; that, in May, 1840, certain property then belonging to Powell, consisting of a lot of ground in Jackson, a black boy named Jack, and another slave named Henry, together with the interest of Powell in a store then in partnership with Harris, was offered at sheriff's sale, in virtue of a writ of *feri facias* against Powell, at the suit of Richardson, Waterman and Wood, and that the said Holloway, being the last and highest bidder, it was adjudicated to him for ten dollars, at twelve months' credit, for which he gave a bond according to law. That one of the conditions of

the sale announced was, that the purchaser should be bound for the payment of all mortgages upon the property, having preference over the lien obtained by the plaintiff in execution. That the certificate of mortgages showed a vendor's privilege upon the boy Henry for \$1,400, in favor of the estate of Cabarras, but which had been previously extinguished by said Powell. That the same certificate exhibited a conventional mortgage given by Powell to the same defendant, Holloway, upon said lot and slaves for \$8,500, nominally to secure said Holloway against future endorsements for Powell, which mortgage was fraudulently executed by said Powell to cover his property from his creditors. That the certificate also exhibited a judicial mortgage in favor of John C. Morris for \$509 82; one in favor of Smith and Wright for \$212, and interest; and a number of others not necessary to repeat. That all these incumbrances were superior to that of the seizing creditors, and that the defendant bound himself to pay them, as a part of the price. He further alleges that all said judicial mortgages were extinguished before the sheriff's sale by Powell, whereby said Holloway is liable to pay the same amount to the syndic of Powell's creditors. He further states that at the time of and prior to Powell's surrender, the defendant, Holloway, was indebted to him for sundry claims transferred to him, to wit: a note of Gordon for \$728 72, with interest; one note signed by Bowman for \$45 99, and a debt of \$200 due by Brian; and some others, which the defendant is bound to refund. The prayer of the petition is, that Holloway be condemned in the sum of \$16,000; and for general relief.

The defendant denies the right of the plaintiff to prosecute this claim. He denies that he bought the property according to the conditions set forth in the petition. He denies the fraud alleged, and avers that there were other mortgages on the property not set forth in the certificate of mortgages, to wit: one in favor of the Bank of Louisiana for \$1400; and others. He denies any indebtedness on account of the alleged transfer of debts, and generally all the allegations not expressly admitted.

The sheriff's return upon the *feri facias* in the case of *Richardson et al. v. Powell*, shows that the town lot, the two slaves,

and the interest of Powell in the store, were appraised at \$8,600; that no bid being made for two-thirds of the appraised value, it was advertised to be sold on a year's credit; and the sheriff certifies that having announced to the bystanders the terms of sale as being on a credit of twelve months, with a good and sufficient surety and mortgage, and that the property was sold subject to the payment of all mortgages thereon having preference of this case, the same was adjudged to Daniel Holloway for ten dollars, for which he gave a bond.

The certificate of mortgages, which was read by the sheriff at the sale, shows, in substance, the mortgages as alleged in the petition, and particularly a conventional one in favor of Holloway himself, for \$8,500, to save him from loss or damage in having engaged to endorse notes for said Powell, in such sums as may be required in the settlement with his creditors, and a vendor's privilege on one of the slaves for \$1,400 in favor of Cabarras.

The parol evidence shows that the debt apparently due the estate of Cabarras, according to the certificate of mortgages, had been paid before the sheriff's sale. It is further shown that the interest of Powell in the store was worth about \$3,000; that Powell received, in April, 1837, of Hermann, Briggs & Co., \$2,222 48, the proceeds of thirty-five bales of cotton shipped by Holloway, and that Powell was treated by that house as the accredited agent of Holloway.

Powell himself testifies that he transferred several notes, and other evidences of debt to Holloway, but that it was to repay him a loan of upwards of two thousand dollars, that he released Powell on account of such transfer, in 1844, and that Gordon's note was transferred in 1840. It is further shown that Holloway paid the other partner for his share of the stock of goods, \$3,500. The record shows a judgment against Holloway, upon a note of Powell's for \$800, endorsed by him in 1840. It is not clearly shown that Holloway has paid any thing as endorser, the reimbursement of which was secured by the mortgage in his favor. The plea of prescription cannot avail the defendant. Although it is alleged that the mortgage to Holloway was given in fraud, yet the action is not a revocatory one.

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The plaintiff does not seek to annul the sale on the ground of fraud. On the contrary, by claiming the price for the benefit of Powell's creditors, he affirms the sale; but alleges that the mortgage to secure Holloway can have no effect, because nothing was ever paid by him as endorser under that contract.

According to articles 683 and 684 of the Code of Practice, the privileges and *special* mortgages on property, offered for sale by sheriffs, in favor of other persons than the seizing creditor and which are preferred to him, form essentially a part of the price for which it may be sold; and it cannot be sold, unless something be offered over and above their amount. The sheriff is required to announce that the purchaser may retain out of the price offered such amount of privileged debts and *special* mortgages. The purchaser then becomes bound to pay such previous incumbrances as a part of the price. In such a case if it should turn out that a special mortgage or privilege should be certified to exist upon the property, which, in fact, had been extinguished, or which had never attached, as in the case of a mortgage to secure future engagements as endorser, the owner himself, we do not doubt, or his creditors in the case of a surrender, might recover of the purchaser the amount thus erroneously adopted and estimated as a part of the price. Equity forbids that the purchaser should take the property without paying the price.

But in the present case, the sheriff did not comply with the law in such a way as to make it certain what price the purchaser understood he was to pay. All mortgages, whether special, general or judicial, were stated in his return, to be paid. The stock of goods was not susceptible of mortgage, and it is not certified that any privilege existed upon them, having a preference over the plaintiffs in the execution. There was, therefore, no sale, because there was no definite price, and because it does not appear that the bid was something over and above the amount of the special prior mortgages.

But it does not follow that the creditors of Powell are without remedy, and that the defendant can retain the property without paying for it, or for the ten dollars already paid. There having been no sale, the property remained that of Powell, and pas-

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sed to his creditors by the surrender.* We have considered whether under the prayer for general relief we could proceed to decree in favor of the plaintiff, according to this view of the rights of the parties. We have concluded that we may well do so under the pleadings, more especially as the defendant himself contends that there was no sale which bound him to pay the outstanding mortgages.

According to the evidence before us, we think the defendant ought to surrender the town lot and the two slaves for the benefit of the creditors of Powell, and to account for the stock of goods valued at \$3,000. But he is entitled to credit for any sums paid out of his own funds for the benefit of Powell, owing before his surrender. The evidence leaves it doubtful whether the defendant was indebted to Powell for notes transferred to him before the surrender, and whether Holloway had loaned him any money as alleged, and how far the sum of \$2,222, received by Powell of Hermann, Briggs & Co., as the agent of Holloway, has been accounted for. We cannot adjudicate finally upon these points. They must be left open for further investigation.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed; and it is further adjudged and decreed that the defendant surrender to the plaintiff, as syndic of the creditors of Powell, the lot of ground and two slaves mentioned in the petition, and that he account for the stock of goods at the rate of \$3,000, to be credited with such sums as he may show to the satisfaction of the District Court that he had paid for the said Powell, which were owing before his surrender, and on a full settlement of accounts between them previous to that time; and it is further ordered that, for the purpose of this settlement and allowance, the case be remanded for further proceedings according to law; and that the defendant pay the costs of the appeal.

Lyons and Andrews, for the appellant.

A. M. Dunn and Merrick, for the defendant.

* The sale under the *fi. fa.* of *Richardson et al.* was made on the 25th of May, 1840; the surrender of Powell was accepted by the judge, 29th July following.

Collins, Under-Tutor, v. Marshall, Tutor.

**BENJAMIN COLLINS, Under-Tutor of William Packie and another,
Minors, v. BRISBANE MARSHALL, Tutor of said Minors.**

The first section of the act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy, having declared that the benefit of the act shall not be extended to any one owing debts in consequence of a defalcation as a guardian, a tutor, against whom a judgment has been rendered for an amount due to the minors under his care, and who subsequently applied to be declared a bankrupt and was discharged as such, not being protected by the proceedings in bankruptcy, may afterwards appeal from the judgment rendered against him. His assignee should not be made a party to the appeal.

**APPEAL from the Court of Probates of West Feliciana,
Weems, J.**

MARTIN, J. The defendant is appellant from a judgment obtained against him as tutor, by the under-tutor of his minors, on the 1st of July, 1842; he applied for the benefit of the bankrupt law of the United States on the 29th of August of the same year, and, on the 10th of October, White was appointed his assignee; he was discharged on the 31st of January, 1843, and took the present appeal on the 20th of June following.

The appellee prayed for the dismissal of the appeal, on the ground that all the rights of the appellant having passed to his assignee, the appeal was improperly taken by the bankrupt. The cause was continued, and the assignee was made a party, on the 20th of January, 1845.

It appears to us that the appeal ought not to be dismissed. It is true the appellant sought the relief of the bankrupt law of the United States, and obtained it *generally*. But the first section of that law expressly provides that no *guardian* indebted to his minor shall have the benefit of the act. It is useless to examine whether the guardian can, or cannot be relieved from other claims than those of his ward.

Of these it is clear he cannot. The appellant, therefore, not not being protected by the proceedings in the court of the United States, and remaining liable under a judgment of a court of this State, pronounced against him in his capacity of guardian, must be allowed to test the correctness of that judgment in this court; and, consequently, was not deprived of an appeal by the

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proceedings in bankruptcy. His assignee was improperly made a party in this court.

On the merits, the error complained of by the appellant is one of calculation only. He shows that the Court of Probates erred in charging him with interest on the balance of the account which he rendered, and which that court admitted to be correct. Thus, although it appears by the said account that the defendant and appellant charged himself with interest therein, on the sum of \$4,807 72, from the 15th of April, 1839, to 1st of April, 1842, the court in its judgment erroneously charges him with interest from the first date, to wit, 15th of April, 1839, until paid.

It is, therefore, ordered and decreed that the judgment of the Court of Probates be annulled and reversed; and it is ordered and decreed that the accounts of the appellant be homologated, and that he be dismissed from his tutorship, and that the minors have judgment against him for the sum of four thousand eight hundred and seven dollars and seventy-two cents, with interest thereon at the rate of five per cent per annum from the first day of April, A. D. 1842, until paid; that the costs be borne by them in both courts; and that they have a lien and privilege on the real property and slaves of the defendant from the time of his appointment; that Ann Reid, the mother of said minors, be appointed their natural tutrix, and Benjamin Collins their under-tutor, be discharged, and a new under-tutor appointed.

Ratliff and *Dalton*, for the plaintiff.

Haralson, for the appellant.

JOACHIM KOHN and JOHN F. MILLER, Syndics of the creditors of said Miller, an Insolvent, and Horace C. Cammack, Assignee of Kohn, Daran & Company, Bankrupts v. CHARLES BYRNE.

Where a *fi. fa.* and the sheriff's return are produced as evidence of a judicial sale, without opposition, it will be sufficient to prove the sale.

Property claimed by a plaintiff cannot be alienated pending the action, so as to prejudice his rights. If judgment be rendered in his favor, the sale will be con-

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sidered as the sale of another's property, and will not prevent his being put in possession by virtue of the judgment. C. C. 2428.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Lockett* and *Micou*, for the plaintiffs.

A. Hennen, for the appellant.

MARTIN, J. Charles Byrne, the plaintiffs' lessee, being sued on his lease, applied to the District Court of the United States for the benefit of the bankrupt law of Congress. His assignee was made a party to the suit, and the plaintiffs had judgment. Emerson having, during the pendency of the proceedings, acquired Byrne's interest in the lease, with notice of the proceedings, the court ordered that the judgment obtained against Byrne's assignee be executed on the premises leased, in the possession of Emerson. From this judgment he has appealed.

His counsel has not contested the correctness of the judgment against Byrne's assignee, but has contented himself with urging that the plaintiffs have not made out by legal evidence a case against him, and ought to have been non suited.

The *fi. fa.* issued by the Court of Probates, and the sheriff's return thereon, are said to form all the evidence of the purchase. That no judgment authorizing the issuing of the *fi. fa.* is produced. That the sheriff's return forms evidence against the parties thereto; that as to others, it is *res inter alios acta*. That the return does not show that any title was ever made to the defendant. Farther, the defendant denied all the plaintiffs' allegations, admitting, however, that he is in possession of the premises, not in his own right, but in that of his sister. It does not appear to us that the court erred. There was no bill of exceptions to the introduction of the *fi. fa.* or the sheriff's return. They proved *rem ipsam*, to wit, the sale, under a judgment, to Emerson. The judgment itself might be necessary to establish the *effect* of the sale; but being anterior thereto, could not establish the sale itself, which the judge concluded was sufficiently proved. Emerson's answer admits that he is in possession of the premises, but contends that the right thereto is in his sister. The latter allegation is contradicted by the *fi. fa.* and sheriff's return on the original writ, to the reading of which no opposition was made. The judgment against Emer-

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son is only that the plaintiffs may exact that which they have obtained against Byrne, their lessee, and Emerson's vendor, by availing themselves of the lessor's privilege on the premises. There is nothing personal to Emerson. If he be not the proprietor, he has no interest in preventing the plaintiffs from availing themselves of their privilege on the premises.

It was, perhaps, unnecessary for the plaintiffs to make Emerson a party to the suit. The Civil Code, art. 2428, provides, that "the thing claimed as the property of the claimant, cannot be alienated pending the action, so as to prejudice his right. If judgment be rendered for him, the sale is considered as a sale of another's property, and does not prevent him from being put in possession by virtue of such judgment." See the case of *Long v. French*, 13 La. p. 261.

Judgment affirmed.

 EVARISTE BLANC v. THOMAS BANKS.

One discharged as a bankrupt under the act of Congress of 19 August, 1841, who subsequently promises to pay a debt from which he was released by the bankrupt proceedings, will be liable on his promise.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Lockett and Micou*, for the plaintiff.

Cohen, for the appellant.

MARTIN, J. The defendant is appellant from a judgment which the plaintiff has recovered for a quantity of bricks and sand delivered to him. The claim was resisted on the plea that the defendant had been discharged of all his debts as a certificated bankrupt, by the District Court of the United States. The plaintiff, however, has contended, that part of the bricks and sand were delivered while the proceedings in bankruptcy were going on and since.

The first judge was of opinion that the defendant has, since he obtained his certificate, promised to pay the debt, and that although the evidence of such a promise ought to be received with great caution, as it appears that part of the brick and sand

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only was delivered before the beginning of the proceedings in bankruptcy, and the plaintiff's claim therefor does not appear to have been put on the defendant's *bilan*, the presumption is very strong that he meant not to avail himself of the bankruptcy to avoid the payment for the bricks and sand delivered, while his intention was to continue to be furnished with these articles by the plaintiff, and the promise to pay was repeated a second time at some interval from the first, and both made after the certificate was obtained.

It is true, the promise to pay was accompanied with a declaration that he had no money then, but would pay as soon as he had some. It was urged, that there was no evidence of the defendant having obtained money since. But the judge was of opinion that the expression used by the defendant did not make his promise to pay depend on his ability, but amounted only to the usual *put-off*, used by debtors every day. This, perhaps, would be incorrect, if the sum promised to be paid was not due for bricks and sand received partly by the defendant after his discharge.

Judgment affirmed.

JOHN BROWN v. GIDEON C. FORSYTH.

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Where a rule of court requires, that the subpoena for a witness shall be given to the sheriff, at the latest, on the day preceding that on which the case is fixed for trial, a party will not be entitled to a continuance on account of the absence of a witness, for whom a subpoena was not delivered to the sheriff in compliance with the rule.

APPEAL from the District Court of the First District, *Buchanan, J.*

Durant, for the plaintiff.

Rawle, for the appellant.

SIMON, J. The defendant is appellant from a judgment by which he is condemned to pay the sum of three hundred and two dollars, a balance claimed of him by the plaintiff as due for one year's services as overseer, laborer and superintendent

on a plantation on Red River, the whole amounting to \$360, subject to a credit of \$58, allowed in the petition.

The evidence establishes that on the 2d of March, 1839, the defendant gave the plaintiff a written authorization to go to the plantation of the late Wm. Foster, near Natchitoches, to manage it to the best of his abilities, under the advice and direction of one Green, who lived near the place. The agreement recites in what the plaintiff's labor on said plantation is to consist, in consideration of which the defendant agrees to pay him at the rate of thirty dollars per month, and to furnish him with wholesome food, such as is used on ordinary plantations by overseers.

The parol evidence taken on the trial proves that the defendant, on a certain occasion and at divers other times, expressed himself satisfied with the manner in which the plaintiff had conducted himself. The plaintiff claimed wages for one year, and the defendant admitted that he had been on the plantation one year. Another witness, Green, proves the arrival of the plaintiff on the plantation, with a letter from the defendant; this witness states, that the plaintiff was to manage the planing under witness' direction; that he did not work as directed by him; that he occasionally worked in the field and garden, and that his services on the place were of some value. He further states that he knows nothing against the plaintiff's character, except his stubbornness in not following his directions, &c.

This case presents a mere question of fact; and although the evidence shews a certain disregard on the part of the plaintiff of the directions of the person under whom he was to labor on the plantation, it is clear that as the defendant was satisfied with the manner in which the plaintiff conducted himself during one year on the place, he should pay him the amount of his wages.

With regard to the bill of exceptions taken to the refusal of the court *a quâ* to grant the defendant a continuance, on account of the absence of a witness, we think the court did not err. It appears that the defendant had not conformed to a rule of the lower court, requiring that the absence of a witness

 Succession of Peytavin.

should not be a cause for putting off a trial unless the summons for such witness be given to the sheriff at least on the day preceding that on which the cause is fixed for trial. This the defendant had not done, and his affidavit does not show the degree of diligence required by law in such cases. He does not show that he took any steps to discover the residence of his witness; and it was his duty to have put the summons into the hands of the sheriff, in order to procure the attendance of the witness.

Judgment affirmed.

SUCCESSION OF ANTOINE PEYTAVIN.

The notification of the filing of the account and tableau of distribution of an executor, operates as a citation to all persons concerned, creditors as well as legatees; and the homologation of the account and tableau, bars all further enquiry as to all matters included therein.

Parol evidence is inadmissible to support a claim for conventional interest. The proof must be in writing.

APPEAL from the Court of Probates of Ascension, *Duffel, J.*

J. Seghers and Bernard, for the appellant.

C. A. Johnson and Connely, contrâ.

MARTIN, J. In the account of the executors, filed on the 9th May, 1837, Mrs. Bernard was placed as a creditor for five thousand five hundred dollars, subject to a deduction of fifteen hundred dollars, paid in 1834. She made no opposition, and the executors were authorized to make payment accordingly. In 1843, at the suit of the legatees, the executors filed an account of the monies in their hands after the payment authorized in 1837, and Mrs. Bernard was placed as a creditor for an additional sum of sixteen hundred and twenty-eight dollars and nineteen cents, claimed as omitted through error in the first account, it being alleged that a payment of fifteen hundred dollars by the testator had been applied to the capital instead of to the interest. The legatees resisted her demand on the grounds: 1st, that it was not legal; 2dly, that she had not presented it before, and had not opposed the homologation of the first ac-

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count of the executors and the tableau made accordingly, and they pleaded the homologation of it as *res judicata*. By consent of counsel the opposition to her claim was reserved for future adjudication. As she did not produce the written evidence of a promise to pay conventional interest, testimony was received, and the case submitted to the Court of Probates without argument.

The court sustained the plea of *res judicata*, and Mrs. Bernard appealed. It does not appear to us that the court erred.

In the settlement of successions a *concurso* takes place among the creditors and legatees. All claims must be presented to the executor, administrator or curator, before being acted upon by the court. As the legatees have a right to the residue after the creditors are paid, they have a right to contest the debts, and these must be settled contradictorily with them. The notification of the filing of the tableau operates as a citation to all persons concerned therein, creditors as well as legatees; and the homologation of the executors' account and tableau, bars all further enquiries as to all matters included in the account. No parol testimony can be received in support of a claim for the payment of conventional interest. It is of the essence of legal evidence in support of it, that it be written.

Judgment affirmed.

HENRY B. DRIGGS v. CHARLES MORGAN.

A reconventional demand interrupts prescription; and the interruption necessarily continues until the termination of the action.

A citation headed as issued from "the District Court of the Fourth Judicial District for the parish of P. C." reciting that the action is pending before the said District Court, witnessed by the judge, and signed by the clerk of that District Court, and requiring the defendant to file his answer "in the office of the clerk of the court of the parish first aforesaid, at the court house," &c. is sufficient. *Per Curiam*: The defendant could not be mistaken as to the court before which he was called on to answer.

Though a writ of arrest may have been illegally obtained, the clerk who issued it, and the sheriff who executed it in obedience to the mandates of a competent tribunal, cannot be viewed as co-trespassers with the plaintiff in the suit, who alone is responsible for the consequences of the proceeding.

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Where the affidavit of a party, stating the facts which he intends to establish by a witness, is offered to obtain a continuance on account of the absence of the latter, and his opponent, for the purpose of trying the case, admits that the witness, if present, would swear to the facts stated in the affidavit, and the case is afterwards continued on other grounds, the affidavit and admission cannot be used at any subsequent term.

In an action for damages for a malicious arrest, evidence is admissible to prove the condition of the apartment in the jail in which plaintiff was confined.

Where one sued for damages for a malicious arrest, is not shown to have acted through malice, but to have had reasonable grounds to believe that he would succeed in his action, and no attempt was made to disprove the affidavit upon which the arrest was obtained, the case will be remanded for a new trial, where the damages allowed by the jury appear excessive.

APPEAL from the District Court of Point Coupée, *Nicholls, J.*

SIMON, J. This action was instituted some time after the return of the mandate of this court to the court *a quâ* for execution in the case of *Morgan v. Driggs et al.* (17 La. 176,) and has for its object to recover of the defendant the same damages as were the subject of the plaintiff's reconventional demand in that suit.

It is first proper to notice, however, that the present action, originally based upon three distinct alleged causes of action, to wit: 1st, the wrongful suing out of a writ of injunction; 2d, the illegal arrest and imprisonment of the present plaintiff, then the defendant in the said suit; and 3d, the wrongful and illegal suing out of a writ of sequestration, was tried below, and is now limited to the cause of action growing out of the arrest and imprisonment of the plaintiff at the suit of the defendant, for which said plaintiff, having discontinued his demand for damages claimed for the wrongful issuing out of the injunction and sequestration, claims in his petition a sum of five thousand dollars as damages.

The grounds set up by the plaintiff in his petition with regard to the cause of action upon which he relies, consist in the following allegations: that whilst a suit, instituted by the defendant, Morgan, for the possession of a certain tract of land (see 15 La. 453), was pending against the petitioner, said Morgan instituted another action against him, claiming the possession of the same property described in the first suit, but extend-

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ing his pretensions to a larger quantity of land; that without the shadow of right, but with the sole view of injuring and harassing the petitioner, said Morgan claimed from him the sum of \$2000 for alleged tortious acts on his part, falsely stating in his petition, that the petitioner was about to remove from the State, without leaving property to satisfy his claim, and praying that an order of arrest might be issued against him, &c.; that, according to said Morgan's demand, the petitioner was illegally arrested on his land, and committed to the parish jail, on or about the 6th of April, 1838, where he was confined until the 11th day of the same month. He further states that he was, at the time of his imprisonment, laboring under a severe chronic disease, and that his sufferings were greatly increased by his unjust confinement, and for a long time afterwards. That these odious proceedings on the part of said Morgan, were prompted *by a feeling of malice and revenge* against the petitioner, and *with a desire to persecute and annoy him*, and not in the expectation of establishing any just claim against him; and that, in consequence of the privation of his liberty, of the loss of time, and of his rights as a free citizen, he has suffered damages to the amount of \$5000, for which he prays judgment against the defendant.

The defendant was cited to appear before the court *a quâ*, but, owing to some alleged defect in the citation, the same was excepted to by him, whereupon another citation having been issued, the defendant filed a peremptory exception to the plaintiff's action, founded upon a plea of prescription. The plea was overruled by the inferior court, and the case was fixed for trial, when, on the day fixed, the defendant filed a written motion to dismiss, which was immediately acted upon by said court, and sustained. The plaintiff then moved for a new trial, which was granted; and the cause having remained on the docket during two successive terms, without being acted on, and a judgment by default having been taken, at the third term, against the defendant, the latter filed his answer to the merits, consisting in a general denial of the plaintiff's allegations, and the cause was again continued, after having been fixed regularly for trial.

At the ensuing term the case was tried before a jury, who

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returned a verdict in favor of the plaintiff, for the sum of \$1500 damages; whereupon, a judgment having been rendered accordingly, the defendant, after an unsuccessful attempt to obtain a new trial, on divers grounds which will be noticed hereafter, took the present appeal.

Various points have been presented to our consideration, as growing out of the proceedings had below, previous to the trial of the cause on its merits; and the first one to which our attention was called, is the plea of prescription, on which the defendant rules, in connection with the alleged defect of the first citation.

This plea, although the exception does not indicate it, is undoubtedly founded on the prescription of one year, by which actions for offences and quasi-offences are barred (C. C. art. 3501), and the defendant's counsel has contended that it should have been sustained below, as more than one year had elapsed, not only from the period of the plaintiff's discharge from the imprisonment complained of, but even from the time when the decision of this court was rendered on his reconventional demand, set up in the case reported in 17 La. 176, until the last citation was served on the defendant.

The record shows that the arrest was made on the 6th of April, 1838; that the plaintiff was discharged, by giving bail, on the 11th of the same month; that his reconventional demand was filed on the 1st of June following; that the opinion of this court, in the last case, was delivered on the 8th of February, 1841; that the same was filed in the lower court, at the May term ensuing; that the first citation issued in this suit, and excepted to as defective, was served on the defendant on the 5th of November, 1841; and that the second citation was served upon him on the 20th of April, 1842.

On the first branch of this question, we are of opinion that the prescription was interrupted by the reconventional demand of the plaintiff, set up in the possessory action brought against him by the defendant; and that such interruption lasted until the litigation was finally disposed of, and decided upon by this court, on the appeal. It is true that no citation was served on the defendant in reconvention, as none was necessary to compel

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the then plaintiff to answer the then defendant's reconventional plea. The two parties were in court, litigating their respective rights, and were bound to take notice of the proceedings had, with regard to the exercise of said rights, and of the demands by them made respectively against each other. The defendant's reconventional plea being in the nature of a cross action, exercised by way of exception, was a distinct and separate demand, to which the plaintiff was bound to answer, without pleading to the jurisdiction of the court (Code Practice, art. 377), and was, to all intents and purposes, a suit instituted against the plaintiff in the original action, in consequence of that which said plaintiff had brought against him, (Code of Practice art. 374), and, viewed in this light, it was clearly sufficient to interrupt the prescription. Troplong, Prescription, vol. 2, No. 562, says, "*Une citation pour comparaitre, la logique force d'assimiler une demande reconventionnelle, faite dans le cours d'une instance. Quelle différence y a-t-il en effet entre une demande formée en justice par citation lorsque les parties n'ont pas encore ouvert la lice judiciaire, et une demande formée reconventionnellement lorsque les parties sont en présence du juge?*" He thinks there is no difference, and that it may be considered as "*une demande en justice.*" Sirey, 27th vol., part 1, p. 244. And such interruption necessarily exists during the pendency of the action, and until its final termination. "*Il n'y a pas de péremption, ni des lois, de prescription possible, tant que la procédure se poursuit. Actiones, incluso judicio, non pereunt.*" Dalloz, Dict. de Jurisp. v. 3, p. 672, No. 384.

On the second branch, we think the plea of prescription was properly overruled. It is true that the first citation which was served on the defendant, a few months after the return of our mandate, but within one year from the rendering of our decree, was excepted to as defective, and that, for aught that appears by the record, without the exception having been acted upon by the lower court, the plaintiff thought proper to issue another citation, which was served after the expiration of one year from the date of our judgment; but we are not ready to say that the first citation contained any such defect as should have rendered the exception successful; on the contrary, our impression is, that it was sufficient to bring the defendant into court, and that,

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therefore, it had the effect of interrupting the prescription. The defect alleged in the exception, is, that it requires the defendant to file his answer "*in the office of the clerk of the court of the parish first aforesaid, at the court-house at Pointe Coupée.*" But the citation was headed and issued *from the District Court of the Fourth Judicial District, for the parish of Pointe Coupée.* The suit was therein stated to be pending before the said District Court; said citation was signed by the clerk, under the words: "*Witness the Hon. H. F. Deblieux, judge of said court;*" and it appears to us perfectly clear that the defendant was required to file his answer in the office of the clerk of that court, for that parish; that is to say, of the court for the parish previously designated in the heading of the citation. The defendant could not be mistaken as to the court before which he was called on to answer. The citation was accompanied with a copy of the petition addressed to the judge of the Fourth District, and there was clearly no necessity for issuing a second citation. If the exception was really sustained by the judge *a quo*, (which does not appear by the record,) we feel no hesitation in saying that his opinion appears to us erroneous, and that the defendant's exception, if acted on, should have been overruled.

Having thus disposed of the defendant's plea of prescription, the next point which has been brought to our notice, arises out of the defendant's motion to dismiss the suit, on the ground that, as it is alleged that the writ of arrest, and the arrest itself were illegal, the clerk who issued it, and the sheriff who executed it, should have been joined in the suit, as co-trespassers; and that such co-trespassers are only jointly liable. The officers of the court from which the writ issued, were bound to obey its orders: said writ had issued from a court of competent jurisdiction; and it is clear that they cannot be considered as trespassers, when acting in obedience to the mandates of the competent tribunal from which they derive their authority. The writ of arrest upon which this action is based, was issued at the suit of the defendant, who, therefore, assumed all the responsibility resulting therefrom; and if any one is to be liable for its consequences, they must fall upon the party who, it is alleged, has turned the law of his country into an instrument of oppression or vexation.

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Such responsibility cannot be inflicted upon the officers of a court, who acted within the sphere of its jurisdiction; and we are of opinion that the defendant's motion was properly overruled.

The record contains a bill of exceptions taken to the opinion of the judge *a quo*, rejecting the affidavit of the defendant, as to the purport of the testimony of one Fredericq; and in this we think the said judge did not err. It appears that, at the preceding term, the defendant had offered an affidavit *for a continuance, on account of the absence of the witness Fredericq*, stating in the said affidavit, the facts which he intended to prove by said witness. The plaintiff, wishing to try his cause, immediately admitted that, *if the witness was present, he would swear to the facts stated in the affidavit*, and the cause was fixed for trial, accordingly; but the case was subsequently continued, and the affidavit was offered at the subsequent term, on the trial of the suit, as evidence of the facts which Fredericq, again absent, would prove, if present. This was clearly illegal; and we concur with the judge *a quo*, in the opinion that the facts stated in the affidavit could not be received as evidence, except for the purpose for which said affidavit was intended at the time it was offered, and could not be used at any other term but that at which it was to operate to obtain a continuance of the cause. It was then that the party insisting on the trial, was bound to admit that the witness, if present, would swear as stated; but surely this did not dispense the party offering the affidavit, after the case had been continued, from procuring the testimony of the absent witness, or from issuing the necessary citation for procuring his attendance on the trial of the case, at a subsequent term of the court.

The record contains also another bill of exceptions, taken by the defendant to the testimony of witnesses introduced to prove the kind of treatment received by the plaintiff, while in the custody of the sheriff under the writ of arrest; but as the judge *a quo* declares in the bill that he only permitted the plaintiff to prove the situation and condition of the room in which he was placed in the parish jail, and as the testimony objected to does not go any farther, we think it was properly admitted. The

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defendant was, perhaps, not responsible for the acts of the sheriff or jailor, whilst they had the plaintiff in their custody; but it may be presumed that he knew the situation and condition of the jail, in which the defendant was to be confined at his request.

We now come to the merits of the case, and, in considering the application made by the defendant for a new trial, we only deem it necessary to enquire into the first ground by him set up, to wit, that the verdict of the jury is contrary to law and evidence, in this, that they have allowed *vindictive damages*, when it was proved that Morgan had strong reasonable grounds for believing that he would have succeeded in the suit instituted by him against Driggs; when no malice was shown; and when no attempt was made to contradict the statement made in the affidavit on which the order of arrest was obtained.

In the case of *Ryder v. Adams et al.*, 5 La. 319, this court remarked, that "actions of this kind should be cautiously entertained, and that the proof should leave the mind free from doubt, that the resort to a legal remedy, to enforce a just claim, was to oppress the defendant." It recognised, however, that "the remedies given by law to creditors to enforce their claims ought not to be wantonly and oppressively exercised, and that from want of probable cause, malice might be presumed." In the case of *Escurix v. Daboval*, 13 La. 89, we held, in substance, that where no malice is shown, and the party might have been easily mistaken in taking out his writ, if considerable damages are given, a new trial ought to be granted. Now, under these principles, to which we think it safe and proper to adhere, the enquiry necessarily is, was the appellant entitled to a new trial? The evidence shows no malice on the part of Morgan. He had instituted a suit against Driggs and others, for the possession of a tract of land to which he might fairly have considered himself legally entitled. The defendants, whom he considered as trespassers, were in possession of the land, and the testimony shows that, with ten or fifteen persons employed in cutting wood, he had already destroyed a large portion of the wood growing thereon. The plaintiff, at the time of the arrest, had six hundred cords of wood cut, which he was selling at \$5, and \$3 per cord

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for ash wood ; probably one half of the wood cut was ash ; and he had intended to haul the whole to the river, and had carts running for that purpose ; his business was cutting and selling wood ; and it does not appear to us in any manner extraordinary, that Morgan, whose claim or action was defeated, only because the *locus in quo* was so uncertain that it was impossible to determine whether the defendant's possession extended or not over any part of the tract of land by him claimed, but who had, according to the evidence then adduced, reasonable grounds for believing that he would have succeeded (see 15 La. 451, and 17 *Ib.* 176), should have resorted to such legal remedies as would have secured, not only the property which he was seeking to recover, but also the amount of the damages which he considered himself entitled to, for the waste committed by the defendant on the land. Furthermore, the defendant in those suits was only imprisoned for five days, after which he gave bail ; and nothing in the record shows that Morgan was actuated by any malicious motives in suing out the writ of arrest. No attempt has been made to disprove the affidavit upon which it was obtained ; and, as we said in the case of *Williams v. The Bank of Louisiana*, were the plaintiff to be mulcted in heavy and vindictive damages for having exercised a right to which he thought himself entitled under the allegations in his petition, when no malice, or any other bad motive is brought home to him, "there would be danger in asserting and endeavoring to sustain a misconceived legal right, as this would often be followed by the most unjust and injurious consequences." We are of opinion that, under the circumstances established by the evidence, and in the absence of any proof of malice, or of any fact from which it could be inferred, the damages allowed by the jury were excessive, and that the judge *a quo* should have granted the new trial applied for by the appellant.

It is, therefore, ordered, that the judgment of the District Court be annulled, and that this case be remanded for a new trial, to be proceeded in according to law, and under the principles established in this opinion ; the plaintiff and appellee paying the costs of this appeal.

S. L. Johnson, for the plaintiff.

Cooley, for the appellant.

Skolfield, for the use &c. v. Rhodes and others.

SAMUEL SKOLFIELD, for the use of Valentine Dalton, v. THEODORE B. RHODES and others.

Where property purchased by an heir at a probate sale of the succession of his mother, is resold at the risk of the purchaser on his failure to comply with the terms of the sale, and the notes given for the price by a purchaser at the second sale, are included in the active mass of the community, and the first purchaser subsequently receives his portion of the estate, he thereby ratifies the second sale, and renounces all right under the first adjudication. If the first purchaser was not put in default before the second sale, the only effect of the omission would be to defeat any claim against him for the deficiency, if the property brought less at the second sale.

A note endorsed in blank, like one payable to bearer, may be sued on by any one in possession of it.

In an action by an heir on notes given for the price of real property purchased at the sale of the succession of his ancestor, where security only is asked by the defendants on an allegation of danger of eviction, the vendors of the deceased are competent witnesses to explain facts connected with the title papers, and to prove that they had received the amount of a mortgage appearing to exist in their favor. *Per Curiam*: In a controversy for the land, they could not be heard to support a title derived from themselves, which they would be bound to warrant; but, in a case like this, they can neither gain nor lose by the result of the suit. Their liability as warrantors, in the event of any dispute in relation to the land, is not lessened nor changed by their testimony, nor would the judgment be admissible in their favor. The objection goes rather to their credibility, than to their competency.

APPEAL from the District Court of East Baton Rouge, Johnson, J.

Avery, for the plaintiff.

Elam, for the appellant.

MORPHY, J. This action is brought by the petitioner as the agent of Valentine Dalton, to recover the amount of three notes held by his principal, drawn by T. B. Rhodes, and endorsed by Sarah Rhodes and Elihu Hooper. It is alleged that these notes were given for a tract of land bought by the maker at the probate sale of the succession of Lavinia Dalton, and that at their maturity, they were duly protested, and the endorsers notified of such protest. The defence set up is, that T. B. Rhodes acquired no title to the land by the adjudication; that the sale was made on account and at the risk of John Dalton one of the heirs of Lavinia Dalton, who had purchased the land at its first exposure for sale; that John Dalton became

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the owner of the property by this adjudication, and could not be compelled to comply with its terms, until a liquidation was had and his share in his mother's estate determined, and that he was not legally divested of his title, not having been put in default ; that the second sale, though it took place at the plantation, as advertised, was also advertised to be made at the "Court House in the town of Baton Rouge," on the same day and hour ; that the property was encumbered with mortgages standing in the names of Elias and Abijah Russ, previous vendors ; and finally that the petitioner has no right to recover, as these notes were given for land belonging to the succession of Lavinia Dalton, and it is not alleged that Valentine Dalton is the administrator of the estate, or has become the owner of these notes by a partition among the heirs. By a supplemental answer, it is averred that a large portion of the land sold to Rhodes, and bordering on the line of Skipwith, stands surveyed in the name of one Francis Wise in the office of the Surveyor General, and that the succession had no title thereto ; and it is prayed that the plaintiff be required to give security against any eviction of the premises, &c. There was a judgment below in favor of the plaintiff for the amount of the notes, but providing that no execution should issue, until he should furnish good and sufficient security in the sum of \$1000, to protect the purchaser against any injury or loss from a mortgage of \$200 in favor of the Union Bank of Louisiana, and a legal mortgage for \$340 in favor of the heirs of Alexander Fridge, existing on the property.*

The previous adjudication of the property to John Dalton, and the resale of it on his account and risk, as well as the inaccuracy of the advertisement in which it was inadvertently announced that the second sale was to take place on the premises and at the same time at the court house, are facts, which, if they present any danger of eviction, were well known to the purchaser before the adjudication, and could not justify him in resisting the payment of the price. But, under the evidence in this case, his fear of eviction is entirely groundless. It is shown

* T. B. Rhodes alone appealed.

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that some time after the sale, an informal or provisional partition was made between Valentine Dalton, senior, and his children; that the notes sued on were included in the active mass of the community; and that John Dalton received his portion of the estate of his mother. By so doing, he virtually ratified the sale, and renounced all rights, if any he had, under the first adjudication. The only effect of his not having been put in default might be to defeat any claim that might be made against him for a deficiency, if the property brought less at the last sale. Civil Code, art. 2488. 6 La. 153. 7 La. 506. 3 Rob. 400.

From the *procès-verbal* of the adjudication of the property, the purchaser appears to have furnished his three notes of \$1,286 66 $\frac{2}{3}$ each, endorsed by Sarah Rhodes. The possession of these notes by the plaintiff, under the blank endorsement of Elihu Hooper, is sufficient evidence of title to authorize him to collect them. A note endorsed in blank is not to be distinguished from one payable to bearer, which may be put in suit by any one in possession of it. Far from there being any suspicion that the plaintiff came by these notes unfairly, the testimony renders it probable, if not certain, that he obtained them by the informal partition which judge Tessier informs us, took place between V. Dalton and the heirs of his wife.

The appellant has failed to satisfy us that there is any danger of eviction, on the score of any adverse title to any portion of the land adjudicated to him; nor do we think the judge below erred in allowing Elias and Abijah Russ the vendors of the property to Valentine Dalton, senior, to explain certain facts connected with the title papers, and to prove that they had received the amount of the mortgage which yet appeared to exist in their favor. In a controversy for the land, they could not be heard to support a title derived from themselves, and which they would be bound to warrant; but in a case like the present, where security only is asked on an allegation that there is danger of eviction, they do not appear to us to stand in that relation of interest which should exclude their testimony. They can neither gain nor lose by the result of this suit. Their liability as warrantors in the event of any dispute in relation to the land, is not lessened nor changed by the testimony, they

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have given in the cause ; nor would the judgment in this case be admissible in evidence in their favor. The objection then goes rather to their credibility, than to their competency. 10 La. 425. 12 La. 290. 2 Rob. 339.

Judgment affirmed.

THEODORE B. RHODES v. SAMUEL SKOLFIELD, Attorney in Fact of Valentine Dalton.

Where judgment has been rendered in favor of a party, but with a stay of execution until he shall furnish bond in a fixed sum, with sufficient securities, for the indemnification of the defendant, the latter is not entitled to any notice of the filing of the bond, to give him an opportunity of objecting to its sufficiency, before execution be taken out. The plaintiff is bound, at his peril, to give a sufficient bond. If he fail to do so, his execution may be enjoined ; but the party enjoining must take the consequences, if the bond should, upon enquiry, prove sufficient.

No allowance can be made on dissolving an injunction, for the fees of counsel employed in defending the suit, where there is no proof that any sum had been actually paid by the defendant.

An appellee cannot, by entering in the Supreme Court a *remittitur* of a sum incorrectly allowed by the court below as special damages, throw the costs of the appeal on the appellant.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

MORPHY, J. The defendant, Skolfield, as attorney in fact of Valentine Dallon, obtained a judgment against T. B Rhodes and others, on the 22d of June, 1844, but with a stay of execution until he should furnish a bond, with good and sufficient security, in the sum of \$1000, for the indemnification of the defendants in that suit. On the 18th of July following, the bond required was filed with the clerk of the District Court, and on the next day an execution was sued out, and the sheriff was proceeding to advertize and sell the property of T. B. Rhodes, when, on the 1st of August ensuing, he enjoined the proceedings, on the ground that no execution could legally issue until he was notified of the filing of the indemnity bond, and sufficient time allowed for him to satisfy himself of the solvency of the secu-

Rhodes v. Skolfield, Attorney &c.

rities given, and to make his objections to them; and that the bond was insufficient to protect him, &c.

On a hearing of the case, the injunction was dissolved, with five per cent damages on the amount of the judgment enjoined and fifty dollars special damages, for counsel fees of defendant. The plaintiff has appealed.

There has been no dispute in this court as to the solvency of the securities given by the plaintiff in execution, in conformity with the terms of the judgment in his favor. The evidence clearly establishes that they are perfectly good; but the appellant contends that he should have been notified of the filing of the bond, in order to allow him an opportunity of examining the same, and of urging his objections to its sufficiency, before execution should have issued; that, under the circumstances, he could exercise his legal rights only by enjoining the execution, which issued untimely, and that he should not be made to pay damages.

In cases of this kind much difficulty would be avoided, if the judgment providing for the giving of the bond, named, with the consent of parties, the clerk, or any other person to receive and approve of it. There is no provision of law that requires notice to the adverse party of the filing of an indemnity bond, before the issuing of an execution. The plaintiff is bound, at his peril, to give a sufficient bond; and if he fails to do so, his proceedings may be enjoined. Rhodes knew the condition under which alone an execution could be issued. From the notice of the seizure he had thirty-four days to enjoin and prevent the sale, if the execution had issued improvidently on the filing of an insufficient bond. But the party who thus enjoins must, we apprehend, take the consequences, if the bond, upon enquiry, appears, as in the present case, to be good and sufficient. In the country, the notice contended for would be the means of forcing upon the plaintiff a delay of six months longer in the recovery of his debt. Objections would be invariably urged, and an issue made up which could not be tried before the following term of the court. In the absence of any law on the subject, an injunction, at the risk of the party, would seem to

 Smith v. Taylor and another.

be the proper remedy. It would be perpetuated, if the bond was, on examination, found to be insufficient.

The appellee's counsel has entered in this court a *remittitur* of the fifty dollars allowed below as special damages for counsel fees, on a suggestion that the allowance would not be sanctioned by this court.* This step cannot throw the costs of this appeal on the appellant, who had a right to complain of such an allowance.

It is, therefore, ordered, that the judgment of the District Court be affirmed, so far as it dissolves the injunction with general damages, and that it be reversed so far as it allows \$50 as special damages; the costs of this appeal to be borne by the appellee.

Elam, for the appellant.

Avery, for the defendant.

JAMES B. SMITH v. HUMPHREY TAYLOR and another.

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Proof of an offer by the vendor of a slave, made while the parties were in treaty to compromise the difficulties between them, to give the vendee another in place of the one sold to him, will exonerate the purchaser from the necessity of proving, in a redhibitory action, a tender of the slave.

Where the petition was deposited in the clerk's office, by the plaintiff's attorney, before the time necessary to prescribe the action had elapsed, but, in consequence of the absence of the clerk and deputy clerk from the parish, it could not be filed, nor citation be issued until the time had elapsed, the action will not be prescribed. *Contra non valentem agere, non currit prescriptio*. And parol evidence is admissible to prove the fact of the absence of the clerk and his deputy, which rendered it impossible to institute the suit until the time had elapsed.

Parol evidence is admissible to show an agency in relation to the sale of slaves, where the object of the evidence is neither to make nor destroy the title thereto, but merely to prove an authority to negotiate as an intermediary between the owner and persons applying to purchase.

APPEAL from the District Court of East Feliciana, *Johnson, J. Muse, and Merrick*, for the plaintiff. Prescription does not

* Two witnesses, members of the bar, testified on the trial of the injunction, that \$100 would be a moderate fee for the counsel employed by the defendant in the injunction; but there was no proof that any fee whatever had been actually paid.

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apply in this case. *Contra non valentem &c.* 5 Mart. 425. 7 Ib. N. S. 481. 11 Mart. 66.

Lyons and Lawson, for the appellant. There was no sufficient offer to return the slave. Code of Practice, arts. 404 to 418. *Janin v. Franklin*, 4 La. 198. The cases in 18 La. 109, 1 Robinson 167, and 3 Ib. 357, are inapplicable. The action was prescribed. Civil Code, art. 2512. 11 Mart. 11. 6 Ib. N. S. 129. 3 Ib. N. S. 688. 7 La. 176. And plaintiff's remedy is against the clerk, through whose fault his action is barred.

BULLARD, J. The plaintiff claims in this action the rescision of a sale, and the restoration of the price of a slave purchased of the defendants, on the allegation that he was a habitual runaway and a thief. There was a verdict for the plaintiff, and from a judgment pronounced thereon the defendants prosecute this appeal.

Upon the merits, the verdict appears to us to have been rendered upon sufficient evidence; but the appellants apply for a reversal of the judgment upon several grounds, which we proceed to notice.

1st. That no offer to restore the slave was shown upon the trial of the cause.

Upon this point it is to be remarked, that the allegation of an offer to restore the slave before the institution of the suit, was made in a supplemental petition, which was never answered, and a judgment by default was taken upon it. The evidence of such an offer is not direct and positive; but it is shown that the parties were in treaty to compromise the difficulty which had arisen between them, and that one of the defendants said he had proposed to the plaintiff to give him another negro in the place of the one sold to him. The jury might well infer from this evidence, that the defendants had been sufficiently put in default before this action was brought. See *Hivert v. Lacaze*, 3 Robinson, 357.

2d. It is next contended that the plea of prescription was improperly overruled, the suit not having been brought until more than one year after the sale. It appears that when the year was about to expire, the clerk of the District Court for the parish of East Feliciana, who was, at the same time, a member

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of the Legislature, was attending to his duties in that capacity, having left a deputy in charge of the office, and that the deputy was also absent from the parish for several days before and after the year expired. It further appears that the petition was deposited in the office, by the attorney of the plaintiff, before the year had elapsed, but that it could not be regularly filed, nor citation issued in consequence of the absence of the clerk and his deputy. These facts were shown by the testimony of witnesses, who were, in our opinion, properly permitted to testify, notwithstanding the objection of the defendants' counsel, that one of the witnesses, who was the attorney of the plaintiff, was interested, and that parol evidence is inadmissible to explain, contradict, strengthen, or create a record. The object of the evidence was neither of these, but to show a fact, to wit, the absence of the clerk and his deputy, which rendered it impossible to institute a suit until after the expiration of the year. We think it clearly a case in which the maxim applies—" *contra non valentem agere, non currit prescriptio*." The plaintiff had until the last day of the year to commence proceedings, and was not obliged to procure process of citation before. If, at that time, there was an impossibility to obtain the necessary process, the prescription was suspended. 7 Mart. N. S. 471. 3 La. 221.

The court did not, in our opinion, err, in permitting the testimony of certain witnesses, taken under commission, to be read to the jury, except certain answers, which appeared to the court to contain statements founded on hearsay. The other answers thus admitted, do not appear liable to the objection set forth in the bill of exceptions; nor did the court err, in our opinion, in permitting parol evidence to show an agency in relation to the sale of slaves, when the object of such evidence is neither to make nor to destroy title to slaves, but merely to prove an authority to negotiate as an intermediary between the owner and persons applying to purchase.

Judgment affirmed.

Lynch v. Burr. Tatman v. Burr and others.

JAMES LYNCH v. JOSEPH BURR.
CHARLES TATMAN v. JOSEPH BURR and others.

A judgment in favor of B. against L. having been affirmed on appeal, the former, under the act of 1839, propounded interrogatories to S. & J., who had been L.'s security on his appeal bond, who answered that they were not indebted to the latter, but had in their possession effects belonging to him, deposited with them as collateral security against any liability they might be subjected to as his factors, or securities, &c. T., a creditor of B.'s, having attached the judgment in favor of the latter, against whom he had not yet obtained judgment, took a rule in his suit against B., on the latter, on L., and on S. & J., to show cause why the effects mentioned in the answer of S. & J. to the interrogatories propounded in the first suit, should not be delivered to the sheriff to be sold, and the proceeds applied to the satisfaction of the judgment in favor of B., but deposited in court subject to its future order. *Held*, that S. & J. could not be proceeded against by a rule taken in the suit against B, to which they were strangers; and that, had they been made garnishees therein, no judgment could be obtained against them, before judgment had been rendered against B., and then only as to the effects belonging to the latter; and that the effects in their hands belonged to L., not to the debtor of T.

Sureties on an appeal bond are liable only where it is shown, that there is not sufficient property of the debtor to satisfy the execution. C. P. 596. This fact can be proved only by the return of the officer, charged with the execution of the judgment, showing a compliance with all the requirements of the law. A return that no property was found, and that no demand was made of the debtor because he could not be found, without showing that any demand was made of the plaintiff in execution, his agent, or counsel, is insufficient to render the sureties liable. C. P. 726, 727.

No proceedings can be had against the sureties on an appeal bond, where the *fi. fa.* against the debtor was returned into court before the return day. *Per Curiam*: Had the execution remained longer in the hands of the officer, he might have found property. At all events, the surety is entitled to the advantage of every legal delay.

THESE appeals were brought up from the District Court of the First District, BUCHANAN, J.

MORPHY, J. A judgment obtained by Joseph Burr, junior, against James Lynch, in the first of these suits, for \$4,868 48, having been affirmed by this court, Burr took out an execution on the 28th of March, 1844, and, pursuant to the act of 1839, amending the Code of Practice, put interrogations to S. & J. P. Whitney, who had been Lynch's sureties on his appeal bond. The garnishees answered, that they were not indebted to Lynch in any amount whatever, but that they had in their hands

certain papers and effects, of which they annexed a list to their answers; that the said papers and effects had been placed in their charge by James Lynch in March, 1841, and so far assigned to them as to stand as collateral security for all and any liability which they might incur for said Lynch, as his agents, factors, or securities, &c. As soon as these answers were made, Charles Tatman, who had attached the judgment in favor of Joseph Burr, junior, his debtor, but who had not yet obtained any judgment against him, took a rule in the second of these suits, on the defendants therein, on S. & J. P. Whitney, and on James Lynch, to show cause why the deeds, bonds, merchandize, &c. described in the answers of the garnishees in the case of *Lynch v. Burr, Jun.*, should not be delivered up to the sheriff to be sold, and the proceeds applied in satisfaction of the judgment rendered in favor of Joseph Burr, junior, but said proceeds to be deposited in court subject to such order as might thereafter be made in the suit. This rule having been made absolute, S. & J. P. Whitney appealed. On the 21st of June following, an *alias fieri facias* was taken out in the suit of *Lynch v. Burr, jun.*, which writ was returned, as issued through error, on the 24th of the same month, and on the same day a *pluries fieri facias* was placed in the hands of the sheriff. The return endorsed upon it mentions that in conformity with the order made on the rule in the case of *Tatman v. Burr, jun. et al.*, (a copy of which was annexed to his writ,) he called upon S. & J. P. Whitney, garnishees, and demanded of them to deliver up the property, deeds, bonds, &c. mentioned in said order, to which they answered, that they had appealed from such order to the Supreme Court, and had signed a bond to that effect, and they refused to deliver any thing. A motion was then made by the plaintiff in execution, for a judgment against S. & J. P. Whitney, personally, as sureties of Lynch on the appeal bond. This motion having prevailed, and judgment having been entered up against them accordingly, they appealed.

We are clearly of opinion that there is error in the judgment ordering the delivery and sale of the assets in the hands of the appellants, at the instance of Charles Tatman, the attaching creditor. They were strangers to his suit against Burr, Jun.,

Lynch v. Burr. Tatman v. Burr and others.

and could not be proceeded against by a rule therein. But even had they been made garnishees, no action or judgment could be had against them, before a final judgment was obtained against the defendant Burr, and then only in relation to funds or property belonging to the latter. 5 Mart. N. S. 308. 12 La. p. 16. The assets in the hands of the appellants belonged to James Lynch, and not to the debtor of Charles Tatman.

As regards the rule taken on the sureties of Lynch on the appeal bond, our first enquiry must be, whether the proper steps have been taken to fix their liability, which begins only when it is shown, that, on the execution of the judgment there is not sufficient property of the debtor to satisfy the same. Code of Practice, article 596. 9 La. p. 229. This fact can legally appear only from the return of the officer charged with the execution of such judgment, showing a compliance with all the requirements of the law. The record exhibits three executions. The first neither pursues nor refers to the judgment for which the appellants became sureties on the appeal bond. It purports to have been issued under a judgment obtained by Joseph Burr against Lynch, for \$4587 75, while that, the amount of which is sought to be recovered under this rule, is for \$4868 48. It may well be doubted whether such an execution could be the basis of a proceeding against the sureties, even were the return upon it in strict conformity with law; but this return, while it mentions that no property was found, and that no demand was made of the defendant in execution, because he could not be found, does not show that any was made of the plaintiff, or of his agent or counsel. We have held that such a return, not being that required by law, offers no evidence of the fact which alone can render the sureties liable. Code of Practice, articles 726, 727. 4 La. 301. 17 La. 404. This return is, moreover, contradicted by the proceeding instituted while the execution was in force, which shows that the debtor had assets in the hands of his sureties. The second execution was not acted upon, but immediately returned into court, as issued through error. Under the third execution, which is the only one pursuing and correctly reciting the judgment rendered in the case, no demand for property of the debtor appears to have been made of any one. The return

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of the sheriff upon it, merely mentions that, in conformity with the judgment rendered against S. & J. P. Whitney, in the suit of *Tatman v. Burr, Jun.*, he called upon them to deliver certain papers and effects, which they refused to give up, on the ground that they had appealed from such judgment. This return by no means shows that no property was found, or even that there existed no other property of the defendant than that which the appellants refused to surrender. It further appears that this writ was returned into court long before the return day. Had it remained longer in the hands of the officer, he might possibly have found other property. At all events, the surety in such a case, is, we think, entitled to, and can insist upon having the advantage of every legal delay. 12 Mart. p. 676. The plaintiff in execution might have followed up the proceeding begun under the act of 1839, and obtained in the same suit an order of court to compel the garnishees forthwith to deliver to the sheriff the property in their hands. B. and C.'s Digest. p. 459. If, instead of doing so, he has thought proper to abandon that proceeding, and to resort to a personal recourse against the sureties on the appeal bond, he must show that the law has been strictly pursued, and that none of the formalities provided for their benefit and protection, has been omitted. This, we think, he has omitted to do.

It is, therefore, ordered, that the judgment of the District Court in these cases be reversed; and it is further ordered, that the rules therein taken be discharged, with costs in both courts.

Bradford, for the appellants.

Lockett and Micou, contra.

ANANIAS DUNBAR v. GEORGE W. OWENS and another.

Want of citation of appeal will be cured, where the party appears and contests the case on any other ground than the want of citation.

It is too late after all the parties are actually before the court, to move to dismiss the appeal on the ground that citation was not served within the time prescribed by law.

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A prison-bonds bond will be binding, though it do not conform literally to the words of the statute ; it is sufficient that it complies with it in substance. Thus, where a bond, instead of being made payable to the sheriff, is made directly to the party for whose benefit it was intended, such an informality cannot prevent the party interested from recovering on it. *Per Curiam* : Exemption of the debtor from imprisonment is a legal consideration for the bond ; and every engagement entered into for a good and lawful consideration is binding, whatever be its form.

APPEAL from the District Court of West Feliciana, *Morgan, J.*

MARTIN, J. The petition charges that the plaintiff brought suit, and obtained judgment against one W. C. Harrison ; that being arrested on a *cepias ad satisfaciendum*, his said debtor gave the defendants as sureties to keep the prison bounds ; that he violated his engagement, by departing from the assigned limits of the prison ; and that thereby the defendants have become responsible to the plaintiff, on their bond. The defendants admit their signatures, but aver that they cannot lawfully be made liable on the instrument sued on. There was no dispute below about the facts alleged, but the judge being of opinion that no recovery could be had on the bond, gave judgment for the defendants. The plaintiff appealed.

Two points have been made in this court :

First. That the appeal should be dismissed, because Owens, one of the defendants, was not cited to appear before the return day, and that this court had no authority to extend, as it did, the time for service.

Secondly. That the bond was not taken in pursuance of the statute ; and that there was no transfer of it by the sheriff to plaintiff, as required by the 13th section of the act of 1808.

I. On the day on which the motion to dismiss was filed, the defendants made their appearance, and, pleading to the merits, averred that there was no error in the judgment appealed from, and prayed for its affirmance. They moreover filed points to show that the plaintiff had no right to recover. It has long since been settled here, that appearance, or contesting the cause on any other ground than the want of citation, cures the defect. See 9 Martin, 497. 5 La. 256. But besides this, the motion to dismiss came too late. It was filed long after the appellant had a citation on Owens regularly returned to this

court. Had the appellees wished to avail themselves of the appellant's *laches* in this particular, they should have exercised their right immediately, and not have waited until all the parties were actually before the court.

II. The words in the bond sued on, although they do not literally pursue those of the statute, are, in substance, the same, and, in our opinion, create the same obligations as if the very language of the act had been used. As to the want of a transfer of the bond to the plaintiff, it is easily accounted for by the fact that the defendants thought proper to obligate themselves directly to the plaintiff, thus rendering useless and impossible any such transfer. In this respect the bond does not conform to the statute; but this court has repeatedly held, that every engagement entered into on a good and lawful consideration is binding, into whatever form the contract be thrown. Exemption to the debtor from confinement within the walls of a jail, was a legal consideration for this bond. But it is said that the law of the Recopilacion, under which the former decisions of this court were made on this point, having been repealed before this bond was entered into, they cannot now be invoked. Although those decisions profess to be based on a law of the Recopilacion, we apprehend that, in reality, they rest on the broad and firm basis of reason and common sense. When an instrument unites all the essentials to constitute a valid contract, it is difficult to conceive why it should not be binding, because made directly in the name of the party for whose benefit it was intended. The statute, it is true, seems to contemplate that, in such cases, the bond should be made in favor of the sheriff; but the plaintiff in the suit is the real obligee, to whom that officer is bound to transfer it, in the event of its becoming due. We cannot think that this alteration in the form of the instrument, vitiates it so as to prevent a recovery being had.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and that the plaintiff recover from the defendants two hundred and sixteen dollars, thirty-seven and a half cents, \$16 50 costs of court, \$28 sheriff's costs, and interest on the sum of two hundred and sixteen dollars and thirty-seven and a half cents, from the 1st day of January, 1831,

Woodworth v. Gott.

at the rate of ten per cent per annum, until paid, with costs in both courts, not to exceed the penalty of the bond.

Paterson, Weems and Dalton, for the appellant.

Boyle, for the defendants.

ROBERT B. WOODWORTH v. FRANCIS D. GOTT.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. The plaintiff instituted a suit against the defendant, who had contracted to build three brick houses for him, on the ground that he did not execute the work according to his undertaking, that the same was done inartificially, and not completed within the time agreed upon. He claimed damages for the injury he had sustained.

The defendant pleaded the general issue, averring that he had performed every part of his contract; he denied that the plaintiff had complied with his engagements, or ever put him in default. In a supplemental answer he claimed, in reconvention, a sum of six thousand dollars, according to an account annexed, for work and labor performed under the contract stated in the petition, and for other work growing out of the same.

The case was referred by the judge to experts, who differed materially in their report, in the estimate of damages, deviations from the contract, &c. An umpire was appointed, whose report corresponded with the expert's appointed by the plaintiff, and was homologated. Accordingly judgment was given for \$76 43, in favor of the defendant, on his plea in reconvention. The court, considering that the plaintiff had established almost all the damages claimed by him, thought it proper to decree that each party should pay one half of the costs, and the plaintiff appealed.

It does not appear to us that the court erred in deciding the case on the report of the experts, and we cannot see how it could have done otherwise. The plaintiff's and appellant's counsel has, however, shown that the court erred in allowing a claim of \$129 for extra work done by the defendant, manifestly overlook-

 Succession of Bousquet.

ing an entry of leave given to the defendant, on the motion of his attorney, to discontinue his claim for extra work.

The counsel, also, complains that the court overlooked the plaintiff's claim for the loss of rent, after the period at which the houses ought to have been delivered.

It does not appear to us that the court erred on the last point. Damages cannot be allowed on account of the delay in delivering the houses at the period appointed, unless the defendant has been put *in mora*. The plaintiff ought to be relieved from the error of the judge in over looking the defendant's renunciation of his claim for compensation for the extra work, which is manifest. The \$76 43, which the defendant has recovered, ought to be deducted from the \$129, and the plaintiff must have judgment for the balance, viz : \$52 57.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, and that the plaintiff recover from the defendant the sum of fifty-two dollars and fifty-seven cents, with costs in both courts.

Rawle, for the appellant.

Larue and *Roselius*, for the defendant.

 SUCCESSION OF FREDERIC BOUSQUET.

Persons who have lived in open concubinage, and have not subsequently married, cannot make to each other any donation *inter vivos* or *mortis causa* of moveables, exceeding one-tenth of the donor's estate, after deducting the debts and charges against it.

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APPEAL from the Court of Probates of New Orleans, *Maurian*, J.

Train and *Bruson*, for the appellant.

Biron, for the executor.

Barthe, for the absent heirs.

SMON, J. The matters in controversy in this case grow out of the opposition made by one Marguerite Bourret, to the homologation of the account filed by the dative testamentary executor of the late Frederic Bousquet, on which account she was placed

Succession of Bousquet.

as a creditor of the estate for the sum of \$500. She pretends to be a privilege creditor of said estate in the sum of \$856, for the board and lodging of the two minor children of the deceased, and for the expenses incurred by her for their benefit, during the absence of their father; and she contends that the said sum of \$856 ought to be substituted on the tableau for that of \$500 allowed her.

She further states that a sum of \$2000 has been bequeathed to her by the testator, who left an estate of great value in France, and that this legacy can be discharged without exceeding the portion which the deceased could legally dispose of to the prejudice of his forced heirs. She prays that the tableau may be amended accordingly.

Previous to the filing of this opposition, the attorney representing the absent heirs had already filed his objections to the payment of the legacy of \$2000 to the opponent, on the ground that she was the concubine of the deceased; that the amount disposed of exceeds the one-tenth part of the whole value of the estate; and that, at all events, said amount is more than half of the succession, and ought to be reduced. He also objected to the payment of the sum of \$500, placed on the tableau in favor of Marguerite Bourret, alleging that if it is true that she had charge of the two children during twenty months, she used their services as clerks in her grocery store, for which services a compensation of \$30 per month ought to be allowed, which after deduction of the account for clothing, will leave a balance in favor of the succession; and he prays that the tableau may be amended accordingly.

The judge *a quo* reduced the amount claimed by the opponent to the sum of \$394, and, with regard to the legacy, decided that it should be reduced to the one-tenth part of the *residuum* of the estate; and from this judgment the opponent has appealed.

On the first claim of the appellant, this case presents a mere question of fact, which appears to have been fully investigated below, and we cannot say that the judge erred in the conclusion which he has adopted. The evidence establishes that the two children of the deceased (boys), one aged thirteen and the other fifteen or seventeen years, lived for a certain length of

Succession of Bousquet.

time with the appellant during the absence or after the death of their father. It is shown that she kept a grocery store, that said children were under her charge, and that besides their board and lodging, she sometimes procured them clothes and other things. Some witnesses, however, say, that when they were put on board of a ship for France, they had no clothes, and were so destitute of every thing, that one of the witnesses was obliged to furnish one of the children with the necessary clothing for his passage. The officer who arrested the younger boy swears that the opponent, on being asked by him for the boy's clothes, answered that he had none. On the other hand, it is established by one of the witnesses that he saw the children selling goods in the store; that they appeared to act as clerks; and he thinks each of them worth for their services \$10 a month, besides their board, washing and lodging. Another witness swears that the younger one, as a help in a store, could get \$20 a month; several other witnesses say that the oldest did render some services in the store; that they were of some use to the opponent; while others testify that the children were of no use to her; that they could get nothing besides their board and lodging, and that they are not entitled to any thing beyond their maintenance. The evidence also proves that the appellant paid several small accounts for shoes and clothes furnished to the children; and it is admitted that, on one occasion, she got shirts for them, to the amount of \$20.

With this contradictory evidence how could we say that the judge *a quo* did not allow to the opponent all that she was legally entitled to recover. He heard the witnesses and saw them testify, and was much more able than we are, to discard from the testimony the circumstances and facts sworn to by witnesses on whose credit he may have found that no reliance could be placed. He allowed the appellant \$394; and, we think, this part of the judgment complained of is not such as to require our interference.

With regard to the rights of the appellant under the legacy of \$2000 made to her by the deceased, which by the admissions of counsel, is the only legacy contained in his will, and was shown below, by said admissions, to have been made to his

concubine, it has been contended by her counsel that according to article 1468 of the Civil Code, she was entitled to receive the one-tenth part of the whole value of the estate without deducting the debts and other charges, and that the judgment appealed from is incorrect, as it only allows her the one-tenth part of the *residuum* of said estate; and we have been referred to the case of *Lowery v. Kline* (6 La. 380), as a case in point.

The question in that case was, whether the legatee should be limited to the recovery of the one-tenth part of the *personal* estate, and the court decided that it was only reducible to one-tenth of the value of the estate without making any distinction between the personal and real estate of the deceased, being in the French text of the law, *de la valeur totale des biens*; but this court never entertained or intimated the opinion that the one-tenth part of the whole value of the estate should be allowed to the legatee before deducting the debts, *deducto ære alieno*; as it seems to us clear that the words—*value of the estate*, do not mean the estimated amount of the effects and property, belonging thereto, but its real and actual value after payment of the debts. An estate or succession may be valueless, although the inventory should amount to a considerable sum, if after deducting the debts, there remains nothing for the heirs or for the legatees; and it would be strange indeed to permit a concubine, legatee of a sum of \$10,000, whose legacy is to be reduced to one-tenth of the value of an estate shown to be worth \$100,000 exclusive of the debts, which, therefore, according to the doctrine contended for by the appellant would entitle her to the whole amount of the legacy, to take the sum bequeathed, to the prejudice of creditors whose claims would amount in the aggregate to a sum nearly equal to the active part of the succession; or to the exclusion of the heirs, if the debts amounted to nine-tenths of such succession, for then the concubine would not only receive the whole amount of the legacy, but would also take the whole value of the estate. We cannot sanction such a doctrine.

Judgment affirmed.

Fink, Executor, v. Martin and another.

JOHN D. FINK, Dative Testamentary Executor of the last will of Sarah Baum, deceased, v. WILLIAM H. MARTIN and another.

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A defendant owes no costs until the final determination of the action, and then only in case judgment be rendered against him. C. P. 549. Otherwise, as to plaintiffs.

A defendant whose property has been sequestered, pending the suit, at the instance of the plaintiff, has a right to have the sequestration set aside, on executing a bond in favor of the plaintiff with the security required by law. C. P. 279. His right to claim possession of the property, is subject to no other condition than that of giving the bond. The sheriff has no right to require from him payment of any of the expenses of the sequestration, before restoring the property. The defendant will be liable therefor, only in case judgment be rendered against him. C. C. 2949. C. P. 283.

Where a plaintiff who has obtained a judgment below, in a case depending before the Supreme Court on a suspensive appeal, represents that his judgment has been recorded in the Mortgage office, and swears that he apprehends that the defendant will conceal, or dispose of, pending the appeal, a slave, on whom he has a mortgage resulting from the recording of the judgment, he may obtain a sequestration from the lower court. C. P. 275. Act 7 April, 1826, § 9. The appellee is not confined to his recourse on the surety in the appeal bond.

As a general rule, the jurisdiction of the appellate court attaches as soon as the appeal bond is filed, and the lower court has no longer authority to take any steps but such as may be necessary to transmit the record to the Supreme Court, or, by a provisional and conservatory order, to secure the ultimate execution of the judgment of the appellate court.

APPEAL from the District Court of the First District, *Buchanan, J.*

SIMON, J. The history of this case is this: It appears that some time in January, 1843, a suit was instituted in the District Court of the First District by John D. Fink, as dative executor of the succession of Sarah Baum, against the defendants, with the view of obtaining the nullity of a mortgage executed by Martin in favor of Ross, on the ground of fraud; and also on the ground that he had obtained a judgment against Martin, in the Court of Probates, as one of the sureties of Thomas Powell, who had been removed from the office of testamentary executor of the said succession. The plaintiff obtained a judgment by default against said defendants, from which the latter took an appeal, which is yet pending before this court.

Some time previous to the institution of said suit, (Decem-

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ber, 1842,) the plaintiff had issued a *fi. fa.* from the Probate Court against Martin, but having been unable to sell the property seized, owing to the existence of previous mortgages, and the sheriff retaining in his possession a slave named David, seized among the rest, notwithstanding no sale thereof had been or could be made, a rule was taken by Martin on the plaintiff and sheriff, to show cause why said slave should not be returned to him, &c. This rule was made absolute, on appeal, by this court. See the case of *Fink, Executor, v. Martin*, in which it was decided that the defendant Martin *should recover the possession of the slave then in the custody of the sheriff, the plaintiff and appellee paying the costs in both courts.*

It further appears that after the return of our mandate to the inferior court for execution, the plaintiff, John D. Fink, filed a supplemental petition in the District Court, for the purpose of suing out a writ of sequestration, to preserve the slave in the custody of the sheriff during the pendency of the appeal before this court, and to prevent the concealing of said slave by the owner, or his being conveyed out of the State, which writ was granted and regularly sued out, by virtue of which the sheriff sequestered the said slave *David*, and kept him in his possession until, as shown by his return, he was released by the defendant's executing a bond in the sum fixed by the court. That petition alleges that "petitioner fears that on obtaining possession of the slave, the defendant, Martin, will conceal, part with, or dispose of the same during the pendency of the suit in the Supreme Court, and that, in consideration thereof, and of the recording of the judgment of the Probate Court, he is entitled to cause said slave to be sequestered, to await the final action of the Supreme Court, on the validity of the mortgage in favor of Ross."

A few days after the writ of sequestration had issued, the defendant, Martin, made a motion to obtain possession of the slave sequestered, on his filing a bond according to law. This was granted by the court *a quâ*, which ordered that the sheriff should deliver the slave to said Martin, on his executing his bond with the surety therein named, in the sum of twelve hundred dollars conditioned as the law directs, which bond was given and

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filed accordingly ; but on the same day, this order was amended by an order of the said court, on the motion of the sheriff, and on his suggesting that he had incurred considerable expense for keeping the slave sequestered, and also in order to obtain possession of the same, for which he has a privilege for keeping and preserving said slave ; and it was accordingly further ordered by the inferior court, that previous to obtaining possession of the slave sequestered, the defendant should pay to the sheriff the amount of costs so expended by him, and that the previous order to bond said slave should be amended accordingly, and from this last interlocutory judgment, the defendant, Martin, has appealed.

Sometime after the aforesaid appeal was taken by Martin, he filed a written motion for a rule on the plaintiff, to show cause why the sequestration previously sued out should not be set aside, and the plaintiff's supplemental petition dismissed, on the grounds : 1st, that the judgment rendered by the District Court had been appealed from, and all its effects suspended by the suspensive appeal ; and that the fact that plaintiff caused his judgment to be recorded, gives him no privilege which authorizes a writ of sequestration to be issued ; 2d, that the judgment set forth in the said supplemental petition has been satisfied, or that said plaintiff has in his hands funds sufficient to satisfy the same ; and 3d, that at this stage of the proceedings, a final judgment having been rendered more than a year previous, a supplemental petition cannot legally be filed by the plaintiff.

The plaintiff answered to the rule, when, on the day fixed for the trial thereof, after an investigation of the grounds therein stated, the judge *a quo*, being of opinion, that by the previous appeal the cognizance of the suit was withdrawn from his court, and is now vested in the appellate tribunal—that no new issue could be raised by the filing of a supplemental petition—that the appeal bond given by the appellants is all the security that the law authorizes the court to grant to the appellee for the satisfaction of his judgment, and that said appellee has no legal right to the additional security of a sequestration of the appellant's property pending the appeal, made the rule abso-

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lute, and ordered the supplemental petition and writ of sequestration to be dismissed; and from this judgment the plaintiff has, also, appealed.

It results, therefore, that this case comes up on two appeals, to wit: one taken by the defendant Martin, from the judgment ordering him to pay the costs due to the sheriff for keeping the slave sequestered, before the latter is bound to deliver him back the property; and the other taken by the plaintiff, who complains of the dismissing of his petition and writ of sequestration.

On the appeal taken by Martin we have come to the conclusion, that the judgment complained of is erroneous; as, being the party defendant, the appellant owed no costs until the final determination of the suit, and then only in case judgment should be rendered against him. Code of Practice, art. 549. The rule is different with regard to plaintiffs, who are always bound to pay the officers from whom services are required, and who are even bound to give security for the payment of the fees due to clerks and sheriffs, whenever the latter think proper to demand it; and such officers are accordingly authorized by law to collect their fees at certain periods, before the final decision of the suit. Bull. and Curry's Dig., *Verbo* Fee Bill, Nos. 18 and 22. Here, the writ of sequestration was issued at the suit of the plaintiff, and the slave sequestered was taken possession of by the sheriff for the benefit of said plaintiff, whose object was to keep and preserve said slave, until after the decision of the suit. Code of Practice, art. 269. But the defendant had a right to have the sequestration set aside, on executing his obligation in favor of the sheriff with one good and solvent surety, for the amount to be determined by the judge. Code of Practice, art. 279. And such right was subject to no other condition than the giving of said obligation, from which the security thus given becomes responsible that the defendant shall not send away the slave out of the jurisdiction of the court, that he shall not make any improper use of him, and that he will faithfully present him, after definitive judgment, in case he should be decreed to restore him to the plaintiff. Ibid, art. 280. Now, how can the sheriff set up a claim and privilege upon the defendant's property for the expenses secured by the sequestration;

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and where is the law that allows him such a privilege, before judgment be rendered against the defendant? Could he maintain an action against him for those expenses? The suit is not determined, and the sequestration may turn out to have been illegally and improperly sued out. Is a citizen to be deprived of the use of his property, and not to be allowed to take it back on complying with the requisites of the law, without previously paying the costs of proceedings, which, on a final decision of the cause, may be pronounced to have been unjustly and vexatiously instituted? Surely not; and without any further comment on the injustice of the appellee's pretensions, we do not hesitate to declare that, from the provisions of the law, they cannot be countenanced.

By the terms of article 2949 of the Civil Code, under the head of "*Judicial Sequestration*," it is provided that "the obligation of the party that has seized the property *consists in paying the guardian his legal fees.*" And article 283 of the Code of Practice says, that "the sheriff may confide the property sequestered to the care of guardians or overseers for whose acts he remains responsible, and that he will be entitled to receive a just compensation for his administration, to be determined by the court, *to be paid to him out of the proceeds of the property sequestered, IF JUDGMENT BE GIVEN IN FAVOR OF THE PLAINTIFF.*" In the French text: "*La cour accordera une indemnité qui sera à la charge de la partie qui succombera sur le procès, et qui sera prélevée sur la chose, SI LE SEQUESTRE EST DECLARE VALABLE.*" *Inclusio unius est exclusio alterius*; and it follows, therefore, that if judgment be not given in favor of the plaintiff, *si le séquestre n'est pas déclaré valable*, the compensation due to the sheriff shall not be paid out of the proceeds of the property sequestered, but shall be paid by the party cast. No final judgment has ever been rendered in this case; the bond furnished by the appellant represents the property sequestered; and we are at a loss to conceive how the judge *a quo* could order the defendant to pay now, the costs incurred by proceedings which may hereafter turn out to be unsuccessful. If the appellant is ultimately bound to pay those costs, his bond standing in lieu of the property, will answer for it, if it is not presented; but it is certain that no such condition

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could legally be imposed, on his taking back the possession of the slave, after the filing of said bond.

On the appeal taken by the plaintiff, this case is, in its nature, very similar to that of *Williams v. Duer*, 14 La. 532, in which we recognized the doctrine, that when a creditor has a special mortgage, or a lien or privilege on the property of his debtor, he has the power of sequestering such property when he apprehends that it will be removed out of the State before he can have the benefit of his mortgage, lien, or privilege, (Code of Practice, art. 275. Bull. & Curry's Digest, p. 774, § 3), and that, in such cases, a writ of sequestration can be granted in the absence of a principal demand pending before the court granting it. In this case the plaintiff alleges in his petition that the judgment upon which the original suit, yet pending on appeal before this court, is based, was duly recorded in the office of the Recorder of Mortgages; that the defendant was the owner, and in possession of two other slaves which he caused to be concealed or conveyed out of the State; and he swears in his affidavit that, *he has a lien by judicial mortgage upon the slave* sought to be sequestered, and that he fears that said defendant will conceal, part with, or dispose of said slave, on obtaining possession thereof during the pendency of the appeal taken in said suit. Thus, it was clearly made to appear that it became necessary to preserve the property subject to the plaintiff's alleged lien by judicial mortgage, during the pendency of the principal action; and we are of opinion that the judge *a quo* erred in dismissing and setting aside the sequestration.

It is true, as a general rule, that the jurisdiction of the appellate court attaches as soon as the appeal bond is filed; and that the court of the first instance has no longer authority to take any steps in the case, except such as are necessary to transmit the record to the superior court. 4 La. 205. 7 La. 448. But as we held in the case first above quoted, we are not ready to decide that the original demand is so entirely and definitively out of the control and jurisdiction of the lower court, as to preclude the judge thereof from granting any provisional and conservatory order, so as to secure the ultimate execution of the judgment to be rendered in the appellate court. So, in the case of *Stanton*

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v. *Parker*, 2 Rob. 550, we held that with regard to the surety on the appeal bond, when such surety becomes insolvent after the appeal is brought up, it is the same as if no security had been given, and such insolvency must be inquired into before the court which granted the appeal, and that, though divested of all jurisdiction as to the case itself and its merits, it is empowered to decide whether execution may be taken out, notwithstanding the appeal. Here, the sequestration which was granted had nothing to do with the merits of the principal action. It was a mere conservatory measure which was resorted to, to secure the preservation and the exercise of the right claimed by the plaintiff in the original suit; and although an appeal bond was furnished by the defendant and appellant, so as to operate as a suspensive appeal, which bond the judge *a quo* appears to consider as the only security to which the plaintiff is legally entitled, we are not prepared to say that the appellee should be deprived of his remedy on the property itself subject to his alleged lien, and that such remedy should not be resorted to before exercising his recourse against the surety on said appeal bond, in case the judgment appealed from should be maintained and ordered to be executed. This is also, perhaps, necessary for the protection of the rights of the surety on the appeal bond, who, although bound for the amount of the judgment to be rendered, has nevertheless the right of requiring the property of his principal to be discussed before being decreed to pay any part of the amount of the judgment. Code of Practice, art. 596. 9 La. 227. Bull. & Curry's Dig. p. 181, § 23. Again, the proceedings had to obtain the sequestration, have no reference to, and do not touch in any way the merits of the original controversy; and, we think, they should have been maintained below, until the final decision of the suit now pending on appeal before this court.

As to the question of satisfaction of the plaintiff's judgment, which forms the second ground set up by Martin in his motion to dismiss the sequestration, we think the court *a quo* properly abstained from expressing any opinion upon it. This question goes to the merits of the original action, and is founded upon a matter which the lower court has no longer any authority to try. It should, perhaps, have been pleaded in the princi-

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pal suit; but it is clear that it cannot at present avail the defendant, so as to destroy in a subsequent proceeding foreign to the original issue, the effect of a judgment, upon which an appeal having been taken, this court has not yet been called on to express an opinion. The District Court was without jurisdiction to take cognizance of a matter which is nothing but a plea in bar of the action now pending on appeal before us.

It is, therefore, ordered and decreed, that the judgment of the District Court as appealed from by Martin, be annulled and reversed; that the sheriff of the District Court do deliver to said appellant the slave *David* heretofore sequestered, in consequence of the filing of said appellant's bond with the surety and for the amount required by the inferior tribunal, without any further condition; and that said sheriff pay his portion of the costs of this appeal.

And it is further ordered and decreed, that the judgment of the District Court as appealed from by the plaintiff, be annulled and reversed; that the rule obtained by the defendant be discharged; that the sequestration be reinstated; and that this case be remanded for that purpose to the lower court, the appellee paying the costs in this court.

Hoffman, for the plaintiff.

McHenry, for the defendants.

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 WILLIAM E. TURNER v. JAMES COPLAND PARKER and others.

The wife's mortgage for the reimbursement of her paraphernal property, attaches only from the date of the actual receipt of the price by her husband.

An undertaker who has recovered a judgment for work and labor on a building, but whose contract was never recorded, and who neither prayed for, nor was allowed any privilege by the judgment, acquires no lien on the property or its proceeds.

The only property of a debtor having been sold under a *f. fa.*, the purchaser, after assuming the payment of certain claims, gave a twelve months' bond for the balance coming to the debtor. The conditions of the sale not having been complied with, the property was re-sold. The purchaser at the first sale having subsequently obtained a judgment against the debtor, seized in the hands of the sheriff the bond given by him to the debtor, claiming its amount out of the proceeds of the second sale. The bond was not sold but handed over to him. On a rule taken by the wife of the debtor, under art. 301 of the Code of Practice, to

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show cause why the proceeds of the sale should not be brought into court, and distributed among the creditors of the defendant in execution, according to their privileges and mortgages: *Held*, that the purchaser at the first sale acquired no title to the bond by its delivery to him; that it remained the property of the defendant in execution, representing the portion of the price supposed to be coming to him; and that neither he, nor the party who pretends to have acquired his rights, can claim its proceeds in opposition to the mortgage creditors of the latter, the defendant in the execution.

A twelve months' bond is not a payment of the debt on which the execution was issued. It operates no novation, but leaves the original obligation in force against the debtor; and its proceeds, when brought into court under art. 301 of the Code of Practice, are subject to the rights which the creditors originally had on the property.

A wife holding the first mortgage on the property of her husband, cannot, by renouncing in favor of others, injure a subsequent mortgagee, by placing before him a larger amount of mortgages than originally existed. Subsequent mortgagees in whose favor she may renounce, transferring to them all her rights, will take her place to the extent of her mortgage, and she will retain her priority over other and inferior mortgagees only for the surplus of her claim, after deducting the claims of those in whose favor she renounced.

Where a suspensive appeal, taken from a judgment recovered in a lower court and recorded in the mortgage office, leaves the judgment unreversed, the plaintiff will be bound to urge any right he may have acquired on the property of the debtor by the recording of his mortgage, before resorting to the surety on the appeal bond. C. P. 579.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MORPHY, J. This is a contest in relation to the distribution of the proceeds of a piece of property belonging to James C. Parker, sold under execution in this suit. This property, which was all that he owned, consisted of several lots of ground he had bought in suburb Saulet, in 1840, and on which he had erected a large ice house, at considerable expense. The controversy was opened by a rule taken by Amelia Parker, his wife, under article 301 of the Code of Practice, which provides that when the debtor has no other property to pay his debts, except that which has been seized, the sheriff may be enjoined from paying the plaintiff's claim out of the proceeds of the sale, and that such proceeds shall be brought into court, and distributed among his creditors according to their privileges and mortgages. The facts in relation to the various claims presented below, are as follows: John Staunton recovered a judgment against James C. Parker for \$2,226 71, which was duly recorded on the 21st of

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April, 1841. From this judgment Parker took a suspensive appeal, but it was finally affirmed by this court. On the 14th of February, 1842, Parker mortgaged the ice house property to the Bank of Louisiana for \$6000, of which only \$3,500 were paid to him, \$2,500 having been withheld to await the result of the appeal taken from Staunton's judgment. Amelia Parker joined in the mortgage given to the bank, renouncing her legal mortgage in its favor, ceding and transferring to it all her rights upon the premises, and subrogating it to her place and stead. The Bank of Louisiana also acquired by transfer a claim of \$751 02, on which Lyall and Davidson had obtained a judgment, with privilege on the ice house, for slating the roof of the building. On the 4th of March, 1842, Parker mortgaged the same property to Wm. E. Turner, to secure the payment of two notes, one for \$3,085 50, and one for \$1,000. Parker's wife joined also in this mortgage, and renounced her legal rights in favor of the mortgagee. These notes not having been paid at maturity, Wm. E. Turner obtained a judgment in the City Court of New Orleans on that for \$1000, which note and judgment he afterwards transferred to Sidle & Stewart. Having also recovered a judgment in the Commercial Court on the larger note, he sued out an execution, under which the ice house property was seized, and sold on the 27th of March, 1842, for \$12,500, on a credit of twelve months. John Mitchell, who became the purchaser of the property, assumed the payment of the debt due to the Bank of Louisiana, gave his bond to Turner for the debt due to him, and for the balance executed a bond for \$1,685 19, which surplus was coming to the defendant James C. Parker. John Mitchell having failed to pay his twelve month's bond to Turner, an execution was issued on the same. At the second sale, J. M. Fisk became the purchaser of the property for \$13,225, which is the fund now to be distributed. In February, 1843, John Mitchell having recovered a judgment against Parker for \$1,697 41, took out an execution, and caused to be seized in the hands of the sheriff of the Commercial Court, the bond of \$1,685 19, given by himself for the surplus of the price of the property coming to James C. Parker. The bond was never sold, but was handed over to Mitchell, who now

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claims to receive its amount out of the proceeds of the second sale. In 1842, Mrs. Parker, finding that the affairs of her husband were embarrassed, sued for a separation of property, and obtained a judgment for the sum of \$10,376, for so much received by her husband in 1840 and 1841, for the sale of a lot, a slave, and some bank stock, belonging to her, and for the restoration of some paraphernal property in kind, which judgment was recorded on the 8th of July, 1842. There is also a claim on the part of Municipality No. 2, for the sum of \$320, for taxes due on the property sold. Mrs. Parker admits a superior right in Municipality No. 2, William E. Turner, Sidle & Stewart, and in the Bank of Louisiana as mortgagee, and as transferee of the privileged claim and judgment of Lyall and Davidson, but claims for herself a priority or right of preference over Staunton and Mitchell; and the contest seems to have been carried on in the lower court between these three creditors. The judge decided that whatever remained of the fund in dispute, after satisfying the superior claims of the above named creditors, should be paid over to Mrs. Parker; and that the title of J. M. Fisk to the property sold to him, should be held good and valid against all the parties to the present controversy. From this judgment, J. Mitchell appealed; and Staunton has prayed in this court that the judgment may be amended so as to allow him the priority he claims.

In support of her claim to be paid in preference to Staunton and Mitchell, Mrs. Parker offered in evidence, in addition to her judgment of separation, a sale executed by her to her father, J. Mitchell, on the 25th of June, 1839, of property she had inherited from her mother's estate, for the sum of \$10,376, in four promissory notes, each for the sum of \$2,594, payable on the 1st of January, 1840, the 1st of July of the same year, the 1st of January, 1841, and the 1st of July of that year. Lewis, the notary, who executed the sale, testified that these four notes were delivered to James C. Parker; and Latrap, the foreman of Mitchell, stated that, early in 1843, Mitchell told him he had paid all the notes except one. From this testimony it appears that the last note was not paid at maturity; but even if it had been paid, the amount would have been received by Parker af-

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ter the recording of the mortgage of Staunton, on the 21st of April, 1841. The wife's mortgage attaches only from the date of the actual receipt of the price of her paraphernal property by her husband. It has not been shown that Parker disposed of this note, or converted it to his individual use before its maturity. Her mortgage then, as against Staunton, exists only to the amount of \$7,782. Civil Code, art. 2367. *Foster v. Her Husband*. 6 La. 25. *Dimitry v. Pollock*. 5 Rob. 348. Before we consider the conflict which arises between Mrs. Parker and Staunton, it is proper to dispose of the claim of J. Mitchell, who contends that he should be paid in preference to both, as the bearer of the bond of \$1,685 19. The evidence shows that the debt on which he obtained a judgment, was for work and labor done upon the ice house; but there never was any contract recorded, nor any privilege prayed for by him, nor allowed by his judgment. He had, therefore, no lien upon the property or its proceeds. Has he acquired any by the delivery of the bond to him? We think not. He never became, by such delivery, the legal owner of the bond. It continued to remain the property of James C. Parker, and represented the portion of the price which it was supposed was coming to him. Had Mitchell paid his bonds, the proceeds would have been subject to distribution under art. 301 of the Code of Practice; and James C. Parker, whose rights Mitchell pretends to have acquired, could have set up no right to any portion of such proceeds, in opposition to his mortgage creditors. This court has held that a twelve-months' bond is not a payment of the debt on which execution has issued; that it operates no novation, and leaves in force the original obligation against the debtor. 2 Mart. 179. 7 Ib. N. S. 205. If this be true, the property having been sold on one of the twelve-months' bonds being delivered to the clerk, according to art. 719 of the Code of Practice, the money now in court is subject to the rights which the creditors originally had on the property. In the case of *Willis v. Her Husband*, in 7 Robinson, where a balance in money proceeding from the sale of land and slaves of the defendant, sold under execution, had been levied upon by a judgment creditor, we held that, under arts. 401, 402 and 403 of the Code of Practice, the

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wife could claim her right of preference over him by reason of her legal mortgage on the property sold, as the money was subject to the privileges and mortgages which existed on the property itself.

The conflicting claims of Stanton and Mrs. Parker now remain to be considered. The view we have taken of the effect of the latter's renunciations in favor of William E. Turner and the Bank of Louisiana, renders it unnecessary to examine the position, that the wife has no legal mortgage as against third persons for her paraphernal rights, until her mortgage is recorded, even if we could consider this question as an open one in this court.* It is admitted on all hands, that the ice house pro-

* *T. Slidell*, for Staunton. A wife has no legal mortgage, as against third persons, for her *paraphernal* rights, until her mortgage is recorded.

Art. 3280 of the Civil Code, declares that "no legal mortgage shall exist except in the cases determined by the present Code."

Art. 3297 provides, that among creditors, the mortgage whether conventional, legal or judicial, has force only from the time of recording it in the manner hereafter directed, except in the cases mentioned below. The exceptions are shown in article 3298, which is as follows: "A mortgage exists without being recorded in favor of minors, interdicted and absent persons, on the property of their tutors, curators and others, over whose property the law grants them a tacit mortgage, either general or special. The mortgage of the wife on the property of her husband for her *dotal* rights, does also exist without being recorded." In this respect, the new Civil Code has changed the law established by the Code of 1808, which was in these words: (See page 454, art. 54.) "Privileges on moveables, as well as on immovables, and legal mortgages, have their effect against third persons without any necessity of being recorded."

In the case of *Pain v. Perret*, 10 La. page 303, it was held that the legal mortgage attaches both for dotal and paraphernal rights, without being recorded; but it will be observed by reference to the statement in that case, at page 301, that the greater portion, at least, of the wife's claim, arose in 1817. The case of *Lanusse v. Lana*, was also a case under the old Code.

But it is said that article 2367 of the Civil Code creates the legal mortgage in the wife's favor, and that this article would be rendered nugatory by the construction for which we contend. The article is in these words: "The wife may alienate her paraphernal property with the authorization of her husband, or in case of refusal or absence of the husband, with the authorization of the judge; but should it be proved that the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same

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perty was the only property owned by Parker since 1841, when Staunton obtained his judgment, and had it recorded. The only mortgages which stood before his on the property, were those

for his individual interest, the wife *shall* have a legal mortgage on all the property of her husband for the reimbursing of the same."

It is a sound rule of interpretation, that where there may be a seeming contradiction of two provisions of law, such a construction, if possible, should be adopted as will give effect to both.

The articles in question are susceptible of such a construction.

In the first place, the expression of article 2367, is *prospective*, not *retrospective*—if it be proved that the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same for his individual interest, the wife *shall* have a legal mortgage, &c. Rather than destroy the positive declaration of article 3297, that *all* mortgages to affect third persons, creditors, should be recorded, is it not more reasonable to say that the true meaning of article 2367 is, that the wife *shall* have a legal mortgage when she shall have proved her claim in a court of justice. Unless some other provision of the Code (and I know of none,) declares that the wife's mortgage for her paraphernal rights, attaches *retrospectively* from the date of the husband's appropriation, why should the doctrine of retrospection be *assumed*? The whole doctrine of tacit mortgages is in *derogation of common right*; and should, therefore, be rigidly restrained to express enactments.

This view of the subject is strongly corroborated, by recurring to the law respecting *dotal* rights; for there we find that the lawgiver has expressly declared the retrospection. Civil Code, art. 2355, sects. 1 and 2. "The wife has a legal mortgage on the immovables, and a privilege on the moveables of her husband, to wit:

"I. For the restitution of her dowry, as well as for the replacing of her dotal effects which she brought at the time of her marriage, and which were alienated by her husband; and this *from the time of the celebration of the marriage.*"

"For the restitution, or the replacing of the dotal effects which she acquired during the marriage, either by succession or by donation, *from the day when such succession devolved to her, or such donation began to have its effect.*"

Surely this difference of legislation cannot be treated as accidental. There is an obvious explanation of the motive which induced the lawgiver to establish the principle of retrospection in the case of dotal, and to omit it in the case of paraphernal rights.

The dotal property of the wife can be so established by the *marriage contract* alone. It can be created in no other way. Civil Code, art. 2318. "Whatever in the marriage contract is declared to belong to the wife, or to be given to her on account of the marriage by other persons than the husband, is part of the dowry, unless there be a stipulation to the contrary."

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of Lyall and Davidson for \$751 02, since transferred to the Bank of Louisiana, and that of Mrs. Parker for \$7782. Had she not renounced her mortgage in favor of the Bank and Turner, it is clear that the property having brought \$13,225, his mortgage would have been paid in full. The question then is, could Mrs. Parker, who held the first mortgage on the property, make a renunciation of her rights in favor of other persons at the expense and to the injury of Staunton, whose mortgage

Now a marriage contract can only be made by a public act. Civil Code, art. 2308. "Every matrimonial agreement must be made by an act before a notary and two witnesses. The practice of marriage agreements under private signature, is abrogated." And by article 3334 it is made the duty of the notary to record such acts.

But paraphernal rights may exist not only independently of a notarial marriage contract, but without any contract whatever, except the mere marriage of the parties. The public then can resort to notarial evidence to ascertain the dotal rights of the wife, at least as to such portion as was brought at the time of the marriage; but the paraphernal rights are matters resting entirely *en pais*.

In the one case, the public has the warning of public written evidence. In the other case they have no such warning, and every one must rely on his own industry in prying into the private concerns of his neighbour.

But again, article 3297 does not annul article 2367. It only restricts it, and even this restriction is qualified. The wife shall have a legal mortgage for her paraphernal rights, says article 2367. But this legal mortgage shall not have force, says article 3297, *against creditors*, until it is recorded.

Now, in the first place, this is not an abrogation, but a mere restriction of the wife's right of mortgage, limited to a certain class of third persons, to wit, *creditors*; and, in the second place, it is a restriction of the wife's right of mortgage.

The decision in *Pain v. Perret*, 10 La. 303, seems based upon the argument that it is difficult to say why the indulgence shown to the wife by the law in regard to her *dotal*, should not be extended to her in case of her *paraphernal* property—in other words, upon the argument of expediency. Such an argument might prevail with the legislature to amend the law; but cannot support the judgment of a court, whose province it is to interpret, but not to legislate. As to the impossibility of the wife's recording her paraphernal claim, it is clear that the same proof which would suffice to establish her claim against a creditor, would also suffice to obtain a judgment against the husband; and that judgment, or *even the proof judicially taken*, could be recorded. In many cases proof susceptible of being recorded would exist extra-judicially, as in a sale of the wife's paraphernal land, slaves, or moveables by a written act, whether public or private, where the husband acknowledges receipt of the price in the act of sale.

stood immediately after her's? In other words, can she, without his consent, change his position, and place before him a larger amount of mortgages than there existed before? It is clear that she could not. The renunciation and cession of her rights, which she thought proper to make, should injure no one but herself. The only effect they can have is to place the Bank and Turner in her stead, to the amount of their debts, and she can retain the priority over Staunton only for the surplus of her claim after satisfying those of the persons in whose favor she renounced. If, notwithstanding her renunciation, she could retain her rank as a mortgage creditor for the full amount of her claim, she would have surrendered nothing, in case the property had brought enough to pay her own claim as well as those of the Bank and Turner. The only sufferer would be the next mortgage creditor, who would lose his rank and priority over these new and subsequent mortgagees, in consequence of her renunciation. This question is by no means a new one, although it presents itself for the first time to the consideration of this court. We find it treated by Troplong in his work on Privileges and Mortgages. He supposes the case before us: "Pierre emprunte de l'argent à Tertius sous l'hypothèque du fonds Cornélien. La femme de Pierre comparait au contrat, et renonce à son hypothèque sur ce fonds. Pierre étant tombé en faillite le fonds Cornélien est vendu; alors se présentent à l'ordre, 1o la femme de Pierre pour 4,000 fr.; 2o. Secundus pour 5,000 fr.; 3o. Tertius pour 4,000 fr.

D'après l'argument qu'on peut tirer de la loi Claudius Felix 16, Dig. *qui potior*, voici ce qui arrivera. On préleva les fonds dus à la femme de Pierre; mais cette somme sera donnée à Tertius en vertu de la renunciation que l'épouse a faite en sa faveur. Secundus touchera ensuite en deuxième ordre les 5,000 fr. qui lui sont dus. S'il reste des fonds, la femme les prendra en place de Tertius. Ainsi l'épouse sera créancière chirographaire à l'égard de Tertius. Mais son rang n'en subsistera pas moins pour laisser Secundus au second rang. Car ce qui est intervenu entre Tertius et l'épouse de Pierre est pour lui *res inter alios acta*." 2 Troplong, Des Priv. et Hypoth, No. 600. 10 Toullier, No. 197. Dig. B 20, T 4. L. 16, *Qui potiores*.

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The case put by Troplong is that of a simple renunciation of the wife, which, in his opinion, is equivalent to a transfer of her rights. In the present case, Mrs. Parker *cedes, transfers and conveys* her rights in both acts of mortgage; and in that of the Bank, she expressly subrogates it to all her rights in the property. It is urged that, if Staunton has suffered, it is attributable to his own neglect; that having had his judgment recorded so long before Mrs. Parker's renunciations, he should have had the property seized and sold; that if he was prevented from so doing by an appeal, he no doubt required good security from Parker, and that this claim of Staunton is now prosecuted, not for his benefit, but for that of the security, who is personally bound, and has no recourse against the property. To this the answer is obvious, that Staunton cannot look to Parker's security on the appeal bond, until all the property, real and personal, of the principal debtor is exhausted; and that it is his duty to urge his claim in the present distribution, and obtain whatever he can for the benefit of such security. Code of Practice, art. 579. *Chalaron v. McFarlane and others*, 9 La. 229.

J. M. Fisk, the purchaser of the property at the second sale, intervened in the proceedings on the rule taken by Mrs. Parker, and prayed to be protected in his purchase from the claims of the parties to this controversy, and particularly from the legal mortgage of Parker's wife, this being the only property owned by him; it is clear that, under the sheriff's sale and the distribution of the price among all the mortgage creditors of the defendant, among whom his wife figures, the property has passed into the hands of the purchaser free from any incumbrance.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court be reversed, and it is ordered and decreed that the sum of \$13,225 be distributed as follows:

1st. That the claim of Municipality No. 2, for taxes, to wit, \$320, be paid, with costs.

2d. That \$751 02, be paid to the Bank of Louisiana, as transferee of the judgment of Lyall & Davidson, with legal interest up to the day of the sale to Fisk, to wit, the 6th of May, 1844, with all costs as allowed by said judgment.

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3d. That \$3500 be paid to the same Bank, with nine per cent interest thereon, from the 14th of February, 1843, up to the date aforesaid, with costs.

4th. That \$3085 50, be paid to William E. Turner, with ten per cent interest thereon, from the 4th of November, 1842, up to the date aforesaid, with costs of suit.

5th. That \$1000 be paid to Sidle & Stewart, transferees of the judgment of *William E. Turner v. James C. Parker*, obtained in the City Court, with ten per cent interest from the 2d day of July, 1842, up to the date aforesaid, with costs of suit.

6th. That \$2226 71, be paid to J. Staunton, with costs.

7th. That the balance of the proceeds of the sale, if there be any, be paid to Amelia Parker.

It is further ordered, that the title of J. M. Fisk to the property sold to him under the twelve-months' bond in this suit, be declared good and valid against all parties thereto, and that said property may be held by him free from any mortgage they may have had upon it; the costs incurred on the rule below to to be paid out of the fund to be distributed—those of this court to be borne by the appellant J. Mitchell.

T. A. Clarke. for the appellant.

Hoffman, T. Slidell, L. Peirce and Preston, contra.

JAMES F. HENDERSON and others v. THE WESTERN MARINE AND FIRE INSURANCE COMPANY.

In an action on a policy of insurance against fire, evidence is inadmissible to prove that the loss occurred through the negligence of an agent of the plaintiff. The evidence is irrelevant. *Per Cur.* The underwriters are answerable for any loss occasioned by the negligence of those in charge of the property insured. Such is the law both of marine and fire insurance. But the negligence must be unaffected by any fraud or design on the part of the insured.

In an action on a policy of insurance, effected on account of the plaintiffs by an agent, testimony to prove that the latter, who had a policy for his own benefit on goods in the same building, designedly set fire to the building, is inadmissible, where it is neither alleged nor proved that they were in any way privy to the act. The act can no more affect the plaintiffs than if done by a stranger. A principal is liable civilly for the frauds or misrepresentations of his agent, made in the

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course of his employment, though he neither authorized, justified, nor participated in his misconduct, nor even knew of it; but the misconduct, or misrepresentation on the part of the agent, must be while acting as such, within the scope of his agency. Nor will the record of a suit between the agent and the defendants, on his own policy, be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiffs in the action in which it is offered in evidence. The fraud and false swearing on the part of the agent, being in his own case and for his own purposes, was irrelevant; and the principals not being a party to the suit, the matter was *res inter alios acta*, and cannot be used against them.

When an agent, by whom insurance had been affected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized and acted when he affected it, and not as proof of perjury.

The allegation in an answer that a third person is the real plaintiff in the action, is not sufficient to exclude his testimony.

Where defendants, sued on a policy of fire insurance underwritten by them, are shown to have consented that the property damaged by the fire should be sold at auction, the price at which it was sold is a proper criterion by which to estimate the damage of the insured.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Durant*, for the plaintiffs.

Maybin and Roselius, for the appellants.

MORPHY, J. The petitioners, a commercial firm, located in the town of Bayou Sara, in the parish of West Feliciana, seek to recover \$551,07, which they allege to be the loss they have sustained on a lot of merchandize, insured against fire by the defendants, on the application of Morton Hoffman, their agent in New Orleans, and which was injured by fire during the term of the policy, in a store in Tchoupitoulas street. They aver that the value of the goods, before the fire, was \$971,25; that, after being damaged, they were sold at auction by the order, and with the consent of the underwriters, and produced \$420,18, thus making their loss amount to the sum claimed. The defendants admit the execution of the policy, but deny that the goods were sold by their order, or with their consent, or that the petitioners have complied with the conditions imposed upon them expressly by the policy, or by law. They further say, that the fire was caused by the design, or by the negligence, or fault of Morton Hoffman, the person named in the policy, and who effected the insurance; or by the design, or negligence, or fault of

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some one in the employ of Hoffman, with the view, on the part of said Hoffman, or said other person, to defraud the company, and for whose acts the petitioners are responsible. They further charge that, with the same fraudulent view, Hoffman claimed of them a loss exceeding the amount now sued for, in consequence of all which the policy has been forfeited; that the said Hoffman is the real plaintiff in the case, or that the petitioners are responsible for all his acts, &c. The case was tried before a jury, who gave their verdict in favor of the plaintiffs. From the judgment entered up thereon the defendants have appealed, after vainly attempting to obtain a new trial.

Our attention has been drawn to several bills of exception spread upon the record. The first is to the opinion of the judge below, refusing to hear testimony offered to show that the store occupied by Morton Hoffman was set on fire by him with the intention to defraud the defendants, or was occasioned by his negligence, or other fault. We do not think that the judge erred. If the fire happened in consequence of any negligence, or fault on the part of the plaintiffs' agent, the testimony to prove it was irrelevant, as it is now well settled, both in England and the United States, that the underwriters are answerable for a loss occasioned by the negligence of persons in charge of the property insured; and such is the law both in fire and marine policies. It rests upon the familiar principle that *causa proxima, non remota, spectatur*; fire being considered as the proximate cause of the loss, though the remote cause of it may be traced to some carelessness, or negligence of the assured; or his agents, or servants; but such carelessness or negligence must be unaffected by any fraud, or design on the part of the assured. Fraudulent losses are necessarily excepted, no man being permitted in a court of justice to avail himself of his own turpitude as a ground of recovery in a suit. 1 *Phillips on Insurance*, p. 632. *Patapsco Insurance Company vs. Coulter*, 3 *Peters*, 222. *Columbia Insurance Company vs. Lawrence*, 10 *Ib.* p. 517. *Waters vs. The Merchants' Louisville Insurance Company*, 11 *Ib.* p. 218.

In relation to the testimony offered to prove that Hoffman designedly set his store on fire to defraud the defendants, the

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judge thought, and we think correctly, that it should be excluded, as the plaintiffs were not in the least degree implicated in the charge. Hoffman, it appears, had two policies underwritten by the defendants, the one now sued on, which expressly purports on its face to be for the account of the plaintiffs, although made out in his name; and the other for his own account on goods in the same store. If, to accomplish his own fraudulent purposes, Hoffman committed the act he is charged with, are the plaintiffs to suffer for it, when it is not even intimated that they were in any manner cognizant of, or privy to the deed? Should this wicked and unauthorized conduct on the part of their agent, affect them any more than if it had been that of a stranger? It is true the principal is liable to third persons in a civil suit, for the frauds, deceits, misrepresentations, &c. of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in such misconduct, nor even know of it; but the just and necessary limitation of this general rule is, that such frauds, deceits, misrepresentations, &c. must occur in the course of the agency; and he is not responsible for the agent's wilfull, malicious, and unauthorized acts in matters beyond the agency. Story on Agency, § 452, 456. If, for instance, in effecting the insurance the agent makes a false representation or concealment, such false representation or concealment will be considered as that of his principal, and will have the same effect on the policy as if made by the principal, it being an act within the scope of the agency, and in doing which he represents the principal; but in the present case, the act charged to Hoffman and offered to be proved, cannot be considered as done in the execution of the authority given him, when it is not pretended that the plaintiffs were participants in the fraud. *McManus vs. Oricckett*, 1 East's Rep., 106. *Foster et al. vs. The Essex Bank*, 17 Mass. Rep., 608. *Ware vs. The Barrataria and Lafourche Canal Company*, 15 La. Rep., 170. *Gaillaudet vs. Demaries*, 18 La. 490.

The next bill of exceptions is taken to the opinion of the judge, rejecting as evidence the record of a suit in the Commercial Court between Morton Hoffman and the defendants, which is stated to have been offered by the latter, to prove fraud and

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false swearing on the part of Hoffman, and for the purpose of enabling them to show what portion of the property belonged to the plaintiffs, and what portion belonged to Hoffman individually. The judge's opinion appears to us correct. It does not appear from the bill of exceptions, nor is it pretended by the defendants' counsel, that the fraud and false swearing sought to be shown, took place in relation to the plaintiffs' claim and under their policy. If the evidence offered was to prove such fraud and false swearing on the part of Hoffman in his own case, and for his own purposes, it was clearly irrelevant, as in so doing, he was not acting as their agent, and they are only answerable for, and can only be affected by, such of his acts, as are done in the course of his employment. The plaintiffs, moreover, were not parties to the suit in the Commercial Court. It is *res inter alios acta*, and cannot be used against them.

A third bill of exceptions was taken to the admission of Hoffman's testimony, which was objected to on the ground that he had sworn to a statement of the loss as being the amount of *his* loss; that he was charged in the answer with being the real plaintiff; and that the defendants had expressly charged that the fire was caused by the fraud or negligence of said witness, with the view of defrauding them. We think that the judge decided rightly. The affidavit was made by the agent named as such in the policy. When he swore to the loss as his, such an oath necessarily referred to the character in which he was recognized and acted when he effected the insurance. As to the mere allegations of an answer, they cannot be considered as sufficient to exclude any witnesses offered by the plaintiff in a cause.

When the jury were about to retire, the defendants moved the court to charge them, that the sale of the damaged goods at auction, without the consent of the underwriters, was not a proper criterion by which to ascertain the damage done to the property insured. The consent of the defendants that a sale of the goods should be made at auction having been shown in the present case, the judge refused, and properly, we think, to instruct the jury as required. The question as to what course should have been pursued, had no such consent been given, was

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not before the jury. The instruction called for was not, therefore, necessary to assist them in deciding the case.

On the merits the evidence, in our opinion, sustains the verdict of the jury.

Judgment affirmed.

THE STATE v. THE JUDGE OF THE FOURTH JUDICIAL DISTRICT.

N. having obtained an injunction from a District Court to arrest the execution of a writ of possession, issued from a Probate Court, on the ground that no judgment had been rendered under which the writ could be issued, B., by whom the writ had been obtained, moved to dissolve the injunction for reasons apparent on its face. The motion was overruled, and B. answered, pleading the general issue, and averring that a judgment had been rendered under which the writ of possession was issued. While these proceedings were pending, B. applied to the Supreme Court for a writ of prohibition to the judge of the District Court, on the ground that he had exceeded his jurisdiction. *Held*, that no prohibition could be issued, when the very matter for which it is sought to be obtained is denied, and is the main point in litigation, yet untried in the lower court. *Per Cur.* To grant a prohibition, would be to try the case on its merits, before an appeal. The want of jurisdiction in the District Court does not appear on the face of the petition; and it is not shown that the inferior judge has refused, after being made aware of the existence of a judgment of the Court of Probates, to declare his want of jurisdiction, which depends on the existence of such a judgment.

The writ of prohibition is an extraordinary one, and should be issued only in cases of great necessity, clearly shown, and where the party has applied, in vain, to the inferior tribunals for relief.

APPLICATION for a prohibition to *Deblieux*, Judge of the Fourth Judicial District.

Robertson and *R. H. Chinn*, for the applicant.

Lobdell and *Labauve*, contra.

SMON, J. In answer to the provisional order of prohibition, issued in this case in January last, and notified to the Judge of the Fourth Judicial District, based upon the sufficiency of the matters stated in the petition of Pierre Paul Babin, our learned brother has informed us, "that when the provisional injunction complained of was applied for, he considered that, under the allegations under oath of the party, showing that *there was no judgment upon which the writ of possession under which the sheriff*

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claimed to act could be based, the sheriff and Babin were to be viewed as mere trespassers, and that to such a case, the rule of law giving the execution of judgment to those courts alone which rendered them, did not apply." He further states, that "he considered that cases might arise in which documents purporting to be writs of a court might be obtained, without any previous action or participation of the judge of said court. That, in the case stated in Nolan's petition, the facts related show, that it was impossible that a judgment could have been rendered, as the court is stated to have adjourned without rendering a judgment, and the writ to have been procured after it met again."

The learned judge further says, that "when the cause came up before him at the December session, on a motion to dissolve summarily the injunction, for reasons apparent on the face of the petition, he still maintained his former opinion, as by the motion thus made the defendant admitted, for the time, the facts as stated in the petition, and as they resulted in establishing, as the court thought, that there was no judgment rendered in the Court of Probates, upon which a writ of possession could be founded; and as, on neither of the above occasions was the existence of a judgment, formal or informal, suggested;" and he concludes with the remark, that "had the existence of a judgment, apparently formal, been shown by Babin, the injunction would have been instantly dissolved, under his conviction that the principle reserving the execution of judgments and the staying of proceedings under them to the courts by whom they were rendered, is a law of the land." A copy of the petition upon which the injunction was granted, of the proceedings had below on the motion to dissolve it, and of the defendant's answer, accompanies the answer of the judge; and it appears thereby that, after the motion to dissolve the injunction had been overruled, the defendant, Babin, filed his answer, in which, after pleading the general issue, he avers that there was a judgment homologating the partition in the Probate Court, which, he states, he is ready to produce, and show upon the trial of the case.

Now, on referring to the petition on which the writ of injunc-

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tion was obtained, we find the following allegations: "That the oppositions made by Nolan to the homologation of the partition, were fixed to be tried on the 26th of September, 1844; that on the day so fixed for said trial, the parties appeared in open court, and the said oppositions were tried, *but that there was no judgment overruling the said opposition, nor homologating the said partition, rendered and read in open court, on the day of the trial thereof*; and that, immediately after said trial, the Court of Probates adjourned to the first Monday in October, 1844, *without rendering and reading in open court any judgment, either overruling the said opposition, or homologating the said partition*." The petitioner further states: "*that there is not, and cannot be any judgment* executory homologating the partition aforesaid, and referred to in the writ of possession, and decreeing the slaves therein named as Babin's property, &c." He also represents "that he notified the sheriff *of the non-existence of any such executory judgment, &c.*; and he prays that a writ of injunction may issue and that the sheriff and Babin may be condemned to pay him one thousand dollars damages."

It is obvious from the allegations set forth by Nolan in his petition for an injunction, which were regularly sworn to by him, and from the allegations contained in Babin's petition for a writ of prohibition, which are also sworn to by the latter, that they are at issue upon the question, or rather upon the fact of the existence or non-existence of the judgment upon which the writ of possession was issued, and that such issue, shown to have been joined below by Babin in the injunction suit, is now pending before the District Court. Hence the question presents itself: Have we the power of granting a writ of prohibition, when the very matter upon it is sought to be obtained is denied, and appears to be the main subject in litigation, yet untried and pending in the lower court, in the very suit which the applicant seeks to take from the cognizance of the inferior tribunal? Would not such a proceeding, on our part, amount to trying the case on its merits, without its being before us on an appeal.

It has already been seen that nothing in the petition for an injunction indicates that any judgment, however informal it

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might have been, ever was rendered by the Probate Court upon which the writ of possession complained of could have issued. On the contrary, it states in positive terms that none was ever rendered and read in open court; that said court adjourned to a further period without rendering and reading any such judgment; and that there was not and could not be any judgment executory as referred to in the writ enjoined. Thus the inferior judge far from being apprized of the existence of a judgment, had every reason to believe that the sworn allegations of the plaintiff in injunction were true; and that by taking cognizance of the case, he was not violating the principle of law, which he recognizes himself, in his answer to the rule, as being the law of the land. He was not exceeding the bounds of his jurisdiction, as he had no other means of ascertaining the true state of the facts which gave rise to the application for an injunction, than the allegations upon which such application was founded; and as, in order to take the case out of the court, it was perhaps the duty of the defendant not to make a motion to dissolve the injunction on the face of the petition, (which would have been an admission of the facts therein stated,) but to file his plea to the jurisdiction of the District Court, based upon the existence of the judgment, however informal or irregular it might have been, upon which the writ of possession had been issued. This, however, appears to be now the very issue joined below, as resulting from the defendant's answer to the merits of the controversy, and as this matter has never been tried, nothing shows that the inferior judge has ever refused, on being made aware of the existence of the judgment of the Court of Probates, if any such really exists, to declare that he has no jurisdiction in granting the writ of injunction, and in taking cognizance of the matter upon which it was obtained. It is certain that such want of jurisdiction did not appear on the face of the petition, and as we said, in the case of *The State vs. The Judge of the Commercial Court*, the writ applied for is an extraordinary one, and should only be issued in a case of great necessity, when clearly shown; and before we will issue it, it must appear that the applicant has applied, in vain, to the inferior tribunals for relief. 4 Rob. 50. Here, it will be conceded, that the jurisdiction of the District

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Court depends upon the existence or non-existence of the judgment alluded to in the applicant's petition; and although we have been furnished with a copy of a judgment, said to be the one of which the existence is denied in Nolan's petition for an injunction, we do not feel ourselves authorized to express any opinion on this matter, and to say now that the District Judge has exceeded his jurisdiction. It would be deciding the case on its merits, and it will be time enough to consider this question after the judge *a quo* shall have expressed his views upon it, if the case ever comes before us on an appeal from his decision.

The rule is, therefore, discharged.

ODILE GOURDAIN v. JOHN DAVENPORT.

The action by one who has attained majority, against his tutor, for an account of his tutorship, is prescribed by four years, commencing from the day of majority. C. C. 356.

APPEAL from the Court of Probates of East Baton Rouge, Tessier, J.

Brunot, for the appellant, cited Civ. Code, arts. 3456, 3465, 3466, 3471. *Gayoso de Lemos v. Garcia*, 1 Mart. N. S. 325. *Carraby et al. v. Navarre*, 3 La. 263. *Gosselin v. Abat*, 3 Ib. 551. *Commagère v. Gally*, 6 La. 161.

T. G. Morgan, for the defendant.

BULLARD, J. The defendant John Davenport, formerly the tutor of his deceased brother Joseph Davenport, is sued in this case, to compel him to render an account of his tutorship, by the minor heir, represented by his natural tutrix. The plaintiff's father was born in the year 1807, and although the time of his death is not precisely shown, yet it appears he was alive in 1837 or 1838, nearly ten years after attaining the age of majority.

The defendant, after pleading various matters, and particularly that he had more than paid to his deceased brother, in his life time, all that he was entitled to, and after much evidence had been given upon the merits, finally pleaded the prescription of four years to the action of this ward, under article 356 of the

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Civil Code. This plea was sustained, the suit dismissed, and the present appeal taken.

The court, in our opinion, did not err. The question came before this court in the case of *Commagère v. Gally et al.* (6 La. 161), and it was then decided, that the prescription established by article 356 of the Civil Code applies to such an action as the present, in which the pupil having attained the age of majority, sues his tutor for an account of his tutorship. See the case above mentioned and the authorities therein cited.

Judgment affirmed.

THE COMMISSIONERS OF THE CLINTON AND PORT HUDSON RAIL ROAD
COMPANY v. JOHN KERNAN.

Neither the charter of the Clinton and Port Hudson Rail Road Company, (Acts 7th Feb. 1833, 10th March 1834, etc.,) nor the by-laws of the Company, conferred any authority on their cashier to release a debtor of the Company's by substituting another in his place.

The legal interest on a sum discounted by a bank, is that established by its charter. C. C. 2835.

The provision of the 19th section of the act of 1834, relative to the Clinton and Port Hudson Rail Road Company, which declares, that the mortgages for stock and loans granted by virtue of that act, shall bear interest at the rate of ten per cent a year, after maturity, until paid, applies only to subscriptions for the part of the stock to be secured by mortgage. Under the charter, eight per cent is the rate of legal interest, arising *ex mora*, on a note given for money loaned. Sect. 8.

APPEAL from the District Court of East Feliciana, *Johnson, J. A. M. Dunn*, for the appellants.

McVea, Muse and Merrick, for the defendant.

BULLARD, J. The plaintiffs, as Commissioners for liquidating the affairs of the Clinton and Port Hudson Rail Road Company, allege that the defendant is indebted to that institution in the amount of his note for \$3200, with interest, payable to their cashier. That the defendant, after the note had become the property of the bank, induced the cashier to take the note of one Charles Black, who was notoriously insolvent, for the same amount of money, in lieu of his own note, and thereby got pos-

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session of his own note, under the pretext of selling and transferring to said Black fifty shares of the cash stock of said institution, which were pledged for the payment of said note, but which, at the time of the transfer, had become worthless. They allege that said transaction was unauthorized by the Company, and not warranted by the charter, and was a fraud upon the Company. They annex to their petition the note of said Black, to be returned to the defendant Kernan. They pray for judgment for the amount of the note first given, with interest and costs.

The defendant first answered by a general denial, and then pleaded, as a peremptory exception, that proper parties had not been made, and prescription.

The facts alleged in the petition are substantially proved. The note sued on was given and secured by a pledge of stock. The note of Black was taken in lieu of it, on a transfer of the stock to him, and the defendant released by the cashier alone, without the express consent of the Board of Directors. There was, therefore, a novation, if the cashier was competent to give the consent of the corporation to the contract by which one debtor was released and another accepted in his place.

It is clear that neither the charter nor the by-laws confer such authority on the cashier; and it only remains to enquire, whether its exercise has been sanctioned by usage and the acquiescence of the Directors.

Some of the witnesses testify that similar transactions had been made by the cashier without the authority of the Directors, but with their knowledge. The cashier at that time testifies, that he notified both parties that the Board disapproved the transaction; and a copy of a resolution of the Board to that effect is in the record. It is shown further, that Black voted as a stockholder after the transfer to him of the stock by Kernan.

The evidence is far from satisfying us that the cashier had any authority to bind the corporation, by a release of a debt due to the bank, either derived from the charter or sanctioned by usage. His powers are administrative only. A mere transfer of stock so as to entitle the transferee to vote at a meeting of the stockholders, does not require the consent of the corpo-

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ration; but that is a very different thing from the release of the obligation of the original stockholder to pay his note secured by a pledge of the same stock. The plea of prescription is not sustained.

We conclude that the court erred in giving judgment for the defendant.

The plaintiffs claim interest at the rate of ten per cent per annum. Their right to recover any rate of legal interest above five per cent, in the absence of any stipulation, depends upon the charter of the bank. The 8th section of the act of 1834, entitled An act to amend the act incorporating the Clinton and Port Hudson Rail Road Company, (See acts of that year, page 114,) declares that they shall not receive more than eight per cent per annum on any loan or discount. It is true the 17th section of the same act provides, that the mortgages for stock and loans granted by this act shall bear ten per cent after maturity, until paid. But we understand the last provision to apply to subscriptions for that part of the stock to be secured by mortgage. We conclude that eight per cent is the rate of legal interest, arising *ex mora*, on a note given for money loaned, this being a loan upon a pledge of cash stock. 2 La. 61.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed; and it is further adjudged and decreed that the plaintiffs recover of the defendant, John Kernan, the sum of \$3200, with interest at eight per cent from the maturity of the note, and the costs in both courts.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

Defendant having made a note in favor of a bank, obtained from the cashier possession of the note and a release from the debt, on substituting another debtor in his place. In an action against the maker to recover the amount of the note, on the ground that the cashier had no authority to release him: *Held*, that plaintiffs were under no obligation to cite the maker of the second note as a party to the suit. The release of a debtor is an act of ownership, which the cashier of a bank is not authorized to do, under his general administrative powers.

BULLARD, J. The defendant's counsel have presented a peti-

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tion for a re-hearing at the same time that they are pleased to *imagine* that such applications are listened to by us with reluctance. In this they are certainly mistaken; for we always pay the most respectful attention to such applications, believing them to be dictated by a sense of professional *duty* on the part of counsel, although sometimes indicating an excessive professional zeal, and making too little allowance for an honest difference of opinion.

One ground for asking this re-hearing is, that the court entirely overlooked a plea, on the part of the defendant, that proper parties had not been made, and that Black, the maker of the new note, ought to have been made defendant. It is true this was not noticed, because no reason was given why he should have been cited by the bank as defendant. Such a proceeding would have been absurd in the plaintiffs, who had refused to recognize him as their debtor, and who had no judgment to ask against him. His note was brought into court to be given up to the defendant, Kernan. Perhaps the defendant would have been authorized to cite Black in the case, as his personal warrantor; but between the plaintiffs and him there was no priority of contract, and the defendant did not ask to have him made a party.

Upon the merits, it appears to us that the doctrines of agency as it relates to cashiers of banks, as laid down in Story on Agency, page 103, are applicable; and that the release of a debtor in an act of ownership, which a cashier is not authorized to perform under his general administrative powers. The acquiescence of the board in other transactions of the kind would prove nothing, unless it were shown that in those cases, as in this, the transferee of the stock and maker of the new note, was notoriously insolvent. If in the other instances the new obligor was solvent, no inference can be drawn from the assent of the directors being given tacitly, or their acquiescence in the act of the cashier.

Re-hearing refused.

JEAN DAVID LAIZER v. LOUIS FLORVAL GENERES.

A purchaser evicted from the property, has a right to recover from his vendor the price paid him.

A purchaser, being a possessor *bona fide*, against whom a judgment of eviction has been obtained, is entitled to be reimbursed whatever has been expended by him in useful improvements (C. C. 2485); and he has a right to retain the property until repaid. C. C. 3416. But the value of the improvements should be demanded from the party seeking to evict him, and the premises should not be abandoned until it is reimbursed. Where the purchaser leaves the property before being paid, or being sued, he cannot recover the value of the improvements from his vendor.

A purchaser, not aware of the defects in his title, being a possessor in good faith, is bound to account for the fruits of the thing sold, only from the commencement of a suit for the recovery of the property. C. C. 495, 3416.

APPEAL from the District Court of the First District, *Buchanan, J.*

This was an action by the purchaser against the vendor of certain lots in the city of Lafayette, to recover from the latter, on the ground of eviction, a part of the price, which had been paid, the value of the improvements put upon the property, &c. There was a judgment in favor of the plaintiff for the part of the price of the property paid by him. As to the rest of the claim, there was a judgment for the defendant. The defendant appealed, and the plaintiff prayed for an amendment of the judgment, so as to allow him the full amount of his claims.

J. Seghers, for the plaintiff. The judgment of the lower court is in violation of art. 2485 of the Civil Code, which declares that the vendor shall reimburse, or cause to be reimbursed to the buyer by the person who evicts him, all useful improvements made by him on the premises. See Pothier, *Contr. de Vente*, No. 163, p. 190. Duranton, *Vente*, No. 297, p. 315. Troplong, *Vente*, No. 508, p. 763; Nos. 487, 488, p. 739.

F. B. Conrad, for the appellant.

MARTIN, J. The plaintiff, evicted from several lots which he had purchased from the defendant, institutes this suit to recover the amount of a note for \$750, by him paid, the value of his improvements, and the costs for advertising a monition.

He had judgment for the first item. There was judgment

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against him on the second, the court being of opinion that he had been compensated therefor by the rents which he had received during his possession of the premises. Likewise, on the third, the court observing that the deed from the defendant to him showed that the latter had bound himself to pay the costs of the monition. The defendant appealed.

The claim was resisted on the ground that the amount of the note was compensated by rents received by the plaintiff before the eviction; that the improvements, for which compensation is claimed, were improperly made, after the plaintiff had notice of Connolly's opposition on the monition, under which the sale by the sheriff and the present defendant was set aside.

The plaintiff and appellee prays for the amendment of the judgment in his favor, by allowing him the value of the improvements, and the expense of advertising the monition.

The counsel for the plaintiff and appellee has relied on the Civil Code, art. 2485, which provides that "the seller is bound to reimburse, or cause to be reimbursed to the buyer, all useful improvements;" and has urged, that in a sale the property passes forever to the buyer; and that, on his eviction, his warrantor has no right to compensate the improvements with the rents.

It appears to us that judgment was properly given in favor of the plaintiff for the amount of the note, which was part of the price of the property sold. Judgment was correctly given in favor of the defendant on the rest of the case. He was a *bona fide* possessor, and as such had a claim for the reimbursement of all he expended in useful improvements; and he made the fruits his own until the inception of the suit. Civil Code, art. 495. It is otherwise with regard to the improvements. Until they are reimbursed to him he has a right to retain the property. Civil Code, 3416.

In the present case, however, the plaintiff ought to have demanded the value of his improvements from the party who recovered the premises, and ought not to have abandoned them until he was sued, or was paid for them. He was too hasty in quitting the premises before.

Judgment was also correctly given for the defendant, for the

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costs of the advertisements, the plaintiff having engaged to pay the costs of the monition.

The plaintiff may still claim the value of his useful improvements from the party who has recovered the premises, and taken possession of them.

Judgment affirmed.

EZRA COURTNEY v. THOMAS L. ANDREWS and another.

Defendants having sold certain lots of ground to the plaintiff and another person, the latter gave their notes for the price, payable at future periods. The notes were identified with the act of sale, and secured by mortgage on the property. The other purchaser having subsequently sold his interest to the plaintiff by an act of sale in which the defendants intervened for the purpose of correcting an error in the description of the property, the notes first given were cancelled, and others were executed by the last purchaser, payable to the defendants, or bearer, for the same amounts and maturing at the same periods as the first. These notes were certified by the parish judge to have been given to secure the purchase money of the property; but no mortgage was reserved to secure their payment. Two of the notes last given having been protested for non payment at maturity, the defendants took out an order of seizure and sale under the act in which a mortgage was reserved in their favor, annexing to their petition therefor the protested notes. On a motion to dissolve: *Held*, that to entitle a party to executory process, as the owner of an act importing a confession of judgment, containing a privilege or mortgage in his favor, it must appear from the act itself, that the debtor has declared or acknowledged therein the debt for which the privilege or mortgage was given; that the order of seizure and sale having been applied for under an act containing no declaration, on the part of the plaintiff, of his being indebted to defendants in the amount sued for, and the notes annexed to the petition not being mentioned in the act, no executory process could be legally issued thereon; that no such process could be issued under the first sale, as the notes given under it are admitted to have been cancelled; nor under the second, the defendants not being recognized, nor alluded to therein as the creditors of the plaintiff.

Parol evidence is inadmissible, on an application for an order of seizure and sale, to strengthen or add to the stipulations in the act of mortgage, or to supply the omission of any stipulation. The evidence must appear on the face of the act itself—not *aliunde*.

APPEAL from the District Court of East Feliciana, *Johnson, J.*

SIMON, J. The facts of this case are these: On the 13th of January, 1840, Andrews and wife sold, by notarial act, to J. B.

10r	180
50	54

10r	180
52	289

10r	180
50	54

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Taylor and E. Courtney, three lots in the town of Clinton, for the sum of \$6000, for which the purchasers gave their three notes for \$2000 each, payable in three annual instalments from the first of January, 1840. Those notes were identified with the act of sale.* On the 20th of March ensuing, a certain sale was passed by authentic act from J. B. Taylor to E. Courtney, in which it is declared: "*that for and in consideration of the cancelling of the notes (therein described) given by Taylor and Courtney to Andrews, January 13th, 1840, as the consideration of the lots hereinafter described, sold by said Andrews to Taylor and Courtney, &c.* they, the said Taylor and wife, have given, granted, sold, and delivered unto Ezra Courtney, (present and accepting,) three certain lots, &c." Andrews and wife intervened in the act for the purpose of explaining and correcting an error made in their previous sale, and declared that lot No. 11 in square 17, instead of lot No. 3, was the lot conveyed and intended to be conveyed by the description No. 3, &c.

It appears that on the day of the sale from Taylor to Courtney, three promissory notes were executed by the latter, *in solido*, with two other persons, for \$2000 each, payable to Andrews, or bearer, on the first of January, 1841, '42, and '43, corresponding exactly with the periods of maturity of the three notes mentioned in the first sale, and subsequently cancelled. These last notes, though not mentioned, nor in any manner alluded to in the act of sale from Taylor to Courtney, as replacing the three first notes, contain a certificate of the Parish Judge, in which he declares that, "this note is given to secure the purchase money of three lots in Clinton, this day transferred by J. B. Taylor and wife to Ezra Courtney;" and no date being given to this certificate, the words "this day" must necessarily refer to the date of the notes.

Sometime after the maturity of the second note, Andrews applied by petition to the Judge of the Third District, for the purpose of obtaining an order of seizure and sale of the three lots by him sold to Taylor and Courtney, to satisfy the two first notes executed by E. Courtney and others, alleging therein that

*And were secured by mortgage on the property.

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on the 13th of January, 1840, he had sold said lots to Taylor and Courtney, for the sum of \$6000, payable as stated in the deed; that on the 20th of March ensuing, Taylor conveyed his interest in the premises to E. Courtney, the notes of said Taylor being cancelled, and E. Courtney and others executing their joint and several notes, to petitioner, or bearer, for the sum of \$2000 each, and which were identified by the notary with the act of sale from Taylor to Courtney. The order applied for was granted, and executory process having issued thereon, the sale of the property seized was arrested at the suit of Ezra Courtney, who obtained a writ of injunction for that purpose.

His petition represents that Andrews had no right to obtain the order of seizure and sale, which, he insists, is unauthorized by law. He admits the purchase made by himself and Taylor, on the 13th of January, 1840, for which they gave three notes, &c., but avers that said notes were subsequently novated and paid by the other three notes given on the 20th of March; that these notes were given to Andrews, and the three previous ones were cancelled. He further alleges that no mortgage was executed on the property to secure the payment of the notes of the 20th of March, and that it is not even pretended in Andrews' petition for an order of seizure and sale, nor alleged that any mortgage, or act importing a confession of judgment on the same exists. He prays for a writ of injunction, and claims \$500 damages against Andrews, &c.

Andrews answered by averring that there was no sufficient ground for the issuing of the injunction. He denies that there has been any novation as set forth in the petition; and prays that the injunction may be dissolved, with interest and damages, &c.

Judgment was rendered below in favor of the defendants, dissolving the injunction, and condemning the plaintiff and his security on the bond, to pay, *in solido*, to the defendant Andrews five per centum on the amount enjoined as damages, and the further sum of \$100 as special damages; and from this judgment, after a vain application for a new trial, the plaintiff, Courtney, has appealed.

It has been asserted in the argument of this cause, and assented to by the appellant's counsel in open court, that said appellant

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did not wish to prosecute his appeal ; that he was willing to acquiesce in the judgment appealed from, and had already acquiesced in it ; but that James Holmes, who is the appellant's surety on the injunction bond, having become a party to this appeal by the written consent of all the parties, and being now the real appellant before us, this case is to be examined in relation only to the interest which the said surety has in obtaining the reversal of the judgment complained of.

The only question then presented to our consideration is, whether the injunction sued out was wrongfully and improperly obtained ?

We are of opinion that it was properly granted, and that it should have been maintained below. Under the provisions of our Code of Practice, it is well known that executory process can only be resorted to in two cases, one of which is, when the creditor's right arises from an act importing a confession of judgment, which contains a privilege or mortgage in his favor, (Code of Practice, art. 732) ; and that an act cannot be considered as importing a confession of judgment, unless, being passed before a notary public and two witnesses, the debtor has declared or acknowledged therein the debt for which the privilege or mortgage is given. Ibid. art. 733. Thus, it seems to be absolutely required that the declared indebtedness of the mortgagor, or his acknowledgment of the debt, should appear *on the face of the act itself*, and that nothing short of such written declaration, or acknowledgment in the act of mortgage, should authorize the issuing of executory process. In this case, however, the order of seizure and sale complained of, was applied for upon an act which does not contain, on the part of the plaintiff, Courtney, any declaration of his being indebted to Andrews in the amount sued for by the latter. The notes annexed to Andrews' petition are not even mentioned in the act ; and although those notes contain a certificate of the Parish Judge, showing that they were given to secure the purchase money of the property transferred by Taylor and wife to Courtney, such certificate cannot, in our opinion, be considered as bearing on its face that authenticity which the law requires. Certain it is that Courtney, though the last vendee of the property, which

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had been originally sold by Andrews to himself and Taylor, does not stipulate in the sale from his co-vendee to him that he assumes the payment of the original price due to Andrews, and that, acknowledging his indebtedness, he will discharge alone the amount of the original obligation of both. How could it be said, then, that the instrument sued on by Andrews amounts to a confession of judgment in favor of the latter? He is no where recognized, nor even alluded to in the act as Courtney's creditor; and as to the first act of sale, in which he became indebted jointly with Taylor for the price of the property, we cannot see how the stipulations therein contained could avail the vendor, when he acknowledges himself, in his petition, that the notes given at that time *were subsequently cancelled*, and that, therefore, the evidence of the debt is no longer in his possession, or under his control. Again, we are satisfied that we could not consider the evidence of Andrews' mortgage claim sufficient to authorize the issuing of an order of scizure and sale, without violating the laws upon which his application was based. It may perhaps be sufficient to enable him to proceed in the *via ordinaria*, but we think when the *via executiva* is resorted to, the applicant must bring himself strictly within the requisites of the law.

With regard to the parol evidence admitted below to establish facts which are not shown by the written acts annexed to Andrews' petition for an order of seizure and sale, and which evidence, having been objected to, became the subject of two bills of exception found in the record, we think it was improperly received. The law does not contemplate that parol evidence should be admitted to supply, strengthen, or add to the stipulations contained in an act of mortgage on which an order of seizure or sale is sought to be obtained. The evidence which the law requires must appear on the face of the instrument itself, and none can be received *aliunde*. As we have already said, nothing short of the written declaration, or acknowledgment of the debtor in the deed of mortgage, should authorize the issuing of executory process.

With this view of the case, it is unnecessary to examine the other questions, and particularly that of novation, which have

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been raised, and so seriously contended for in the argument of this cause. It is clear that the order of seizure and sale having been illegally issued, the sale of the property seized was properly enjoined, and that the surety on the injunction bond must be discharged from the payment of the interest and damages allowed below to the appellees.

It is, therefore, ordered and decreed, that the judgment of the District Court, with regard to the appellant Holmes, surety on the injunction bond, be avoided and reversed; and that ours be in favor of said appellant, with the costs in both courts.

Lawson and Merrick, for the appellant.

Lyons and Andrews, for the defendants.

HARRIS LYONS v. WILLIAM FLOWER.

Where a party to a suit is sworn as an ordinary witness at the instance of his opponent, he may state all the circumstances connected with the transaction, though not specially interrogated thereto. No interrogatories having been propounded to him as a party, he is bound to tell the whole truth.

APPEAL from a judgment of the Commercial Court of New Orleans, *Watts, J.*

Greiner, for the appellant.

Preston, for the defendant.

MORPHY, J. This suit is brought to recover \$1075 of the defendant, as the security of one Dr. Desmont, for certain articles of furniture sold and delivered to the latter, in December, 1837. There was a judgment below against the plaintiff, from which he appealed.

The evidence shows that Lyons called upon the defendant, inquiring of him whether he knew one Dr. Desmont, who wished to purchase from him some furniture, and offered in payment a draft on the defendant. The latter answered that the Doctor had no funds in his hands; and asked for what amount he was going to purchase. Lyons said he supposed the bill would be about \$500. The defendant then remarked that he did not like to refuse, and that if Lyons would give as long a time as he could, he would accept the Doctor's draft for that amount.

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Desmont purchased for \$1075. After the furniture was shipped, the bill for it, and a draft at four months, not signed by Desmont, were left at the defendant's counting house, in his absence. About three weeks after, Lyons called upon the defendant, who told him he would not accept the draft, as the time was too short, and the amount so much larger than he was told it would be ; but he told Lyons that Desmont was about selling some negroes to his nephew James Flower, and that, if the sale took place, as the funds would pass through his hands, he would stop a sufficient sum to pay this debt. Some time after, James Flower drew on the defendant a bill for \$2000, in favor of Desmont, payable on the 15th of October, 1838, although the sale of the negroes was not yet completed. The Doctor left the draft in the hands of the defendant, for the purpose, he said, of meeting two debts he had in the city, one owing to Andrews & Brothers, and the other to the plaintiff. The debt of Andrews & Brothers was settled by a draft of Desmont on the defendant, which was accepted and paid ; but Lyons refused to settle for his claim out of James Flower's draft, because the time was too long. The defendant urged him to make the same settlement as Andrews & Brothers, telling him that it was the only way he could settle the debt for Desmont ; but Lyons replied that Desmont had told him that he had good debts due to him by planters in Feliciana, and, that he would be able to get a discount and pay the debt. Lyons added, that he preferred waiting on Desmont, to taking an acceptance at such a long time. From this period, although Lyons frequently called on the defendant for his advice and assistance in getting the debt paid by Desmont, he never made any claim on the defendant for the debt until Desmont absconded some time after. Under these facts, which result principally from the testimony of the defendant himself, who was called upon in the court to be examined as a witness by the plaintiff, we think, with the judge below, that the defendant cannot be made liable. No regular draft was ever presented to him, and under the limited character of his promise he was not bound to accept one for the amount proposed

From the whole course of the plaintiff's conduct in the busi-

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ness, it is clear that he thought of availing himself of defendant's original promise, only after his debtor had absconded. Had he presented a draft in conformity with the terms of this promise, the defendant would have been bound to accept and pay it, and might have repaid himself out of the draft of James Flower, which afterwards came into his hands; but under the circumstances as presented by the record, the plaintiff has, in our opinion, no right to look to the defendant.

We do not think that the judge erred in permitting the defendant to state all the circumstances connected with the transaction, although not specially interrogated thereupon by the plaintiff. No interrogatories were propounded to him upon facts and articles, pursuant to the provisions of the Code of Practice. He was sworn as an ordinary witness, and was bound to tell the truth, the whole truth, and nothing but the truth, touching the matters in controversy between the parties.

Judgment affirmed.

THE SECOND MUNICIPALITY OF NEW ORLEANS v. THE NEW ORLEANS
AND CARROLLTON RAIL ROAD COMPANY.

The provision of the 10th section of the act of 1st March, 1836, amending the charter of the New Orleans and Carrollton Rail Road Company, which, in consideration of a *bonus*, exempts the company, for a certain period, from any liability to be taxed on the part of the State, does not exempt real estate held by the company, in the Second Municipality of New Orleans, from liability for taxes imposed by the municipal authorities.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Rawle*, for the plaintiffs.

T. Slidell, for the appellants.

MARTIN, J. The defendants are appellants from a judgment which rejects their pretensions to an exemption from taxes laid by the plaintiffs, under a clause in their act of incorporation. Acts of Assembly of 1836, sect. 10, p. 27. It does not appear to us that the court erred. The defendants are not to be taxed as a bank, *by the State*—*id est*, the shares in the bank. or the cap-

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ital stock shall not be taxed *by the State*, in conformity with the tax law of 1813. Their real estate is not exempt from city taxes. This question of the taxation of the property of the banks was decided upon lately in the case of *The Second Municipality v. The Commercial Bank*. 5 Rob. 151.

Judgment affirmed.

JOHN D. ANDREWS v. SAMUEL CHAPMAN.

APPEAL from the District Court of the First District, *Buchanan, J.*

Cohen, for the plaintiff.

F. H. Upton, for the appellant.

MARTIN, J. The defendant is appellant from a judgment which decrees the property of a slave, claimed by him, to the plaintiff. He claims under a sale from Johnson. The plaintiff does not deny the sale, nor does he attribute any improper motives to the defendant; but avers, that he was deceived by his vendor, the purchase being evidently *a non domino*.

The counsel for the defendant and appellant has assigned as errors apparent on the face of the record: 1st, that Johnson, cited in warranty, was not before the court; 2d, that the cause was twice before the court, to wit, on the 28th of June, and the 14th of November following; that on the first occasion, evidence by the plaintiff was introduced, when the cause, being admitted to be incorrectly on trial, was continued; and that the same evidence was read on the second occasion, although as to the defendant it was *ex parte*, and as to Johnson, *res inter alios acta*.

There is nothing in this assignment of errors. There was no judgment against Johnson, and he is no party to the appeal. Neither the appellant, nor his counsel attended the trial in November, and no objection was made to the introduction of any evidence. There is a bill of exceptions to the introduction of certain documents from the republic of Texas. But the official capacity of the persons before whom they were taken, being

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certified by the consul of the United States there, under the act of 1840,* and their signatures being proved by witnesses, they were, in our opinion, correctly admitted.

On the merits, which have been submitted to us, the question is one of fact only. The title of the plaintiff was duly proved, and it does not appear that the judgment ought to be disturbed.

Judgment affirmed.

JOHN M. DEMAREST v. AMARON LEDOUX and others.

Defendants offered to file a supplemental answer, to which was annexed an affidavit of one of them, detailing the circumstances of a transaction relative to which they desired to interrogate the plaintiff, accompanied with interrogatories requiring him to say whether the facts mentioned in the affidavit were true, and, if not, to state the facts as they occurred. Plaintiff objected to the filing of the answer, on the ground that the interrogatories were not properly propounded: *Held*, that the application to file the answer was correctly rejected, and that the court did not err in requiring the plaintiff to propound separate interrogatories as to the distinct facts, relative to which he intended to question the plaintiff.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Huston and Finney*, for the plaintiff.

Cooley, for the appellants.

MARTIN, J. The plaintiff alleges that he was employed as a clerk by the defendants for one year, at the rate of one thousand dollars; and he claims a balance of his wages still due.

The answer denies that the plaintiff was employed for any specific time, but according to a usage in New Orleans, under which he might have withdrawn himself whenever he pleased, and the defendants were at liberty to discharge him at any time. The defendants aver that, on the first of April, 1843, they discharged him, paying him his wages up to that time. They further answered that even had the plaintiff been employed as alleged by him, they were justified in dismissing him for his improper and disrespectful conduct towards one of the members

* The act of 28 February, 1837 (Acts of '37 p. 33), is, doubtless, the statute referred to.

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of the firm. The case was submitted to a jury, who found a verdict for the plaintiff, and the defendants, after an unsuccessful motion for a new trial, have appealed.

Our attention has been first drawn to a bill of exceptions taken to the opinion of the court, refusing leave to the defendants to file a supplemental answer, with an affidavit and interrogatories thereto annexed. The court expressed its opinion that this was not a formal mode of putting interrogatories, and that the counsel had an opportunity to conform to the directions of the court in putting interrogatories in a direct and formal manner, but made no application to do so.

The object of the supplemental answer was to introduce an affidavit of one of the members of the firm, stating minutely the circumstances attending the conduct of the plaintiff which gave rise to his dismissal, as stated in the original answer, and interrogatories required to be answered by the plaintiff, relative to the correctness of the statement in the affidavit.*

This is certainly an unusual mode of probing the conscience of the party, and calculated to introduce confusion and difficulty; and it does not appear to us that the court erred in requiring the applicant to dissect his affidavit, and state its particular parts in distinct interrogatories, instead of presenting them in a lump, and running into each other. A close examination of the testimony has left us under the impression, that nothing authorizes us to disturb the verdict.

Judgment affirmed.

*The plaintiff subjoined to the affidavit the following interrogatories:

1. Are not the facts stated in the affidavit hereto annexed true and correct?
2. If any of said facts, or any circumstance therein stated, is not true and correct, state the fact or the circumstance explicitly?

Flower and another v. Dubois and another.

WILLIAM FLOWER and another v. OLIVER DUBOIS and another.

From the nature and terms of the obligation of the surety in an appeal bond, no recourse can be had against him where property belonging to the mass of the creditors of the appellant, subject to certain privileges and mortgages, is yet unsold. It must in such a case be shown by the creditor, that the sale of all the effects of the principal has proved insufficient to discharge his demand. C. P. 579, 596. Act 20 March, 1839, § 20. But where it is proved that the appellant had been declared a bankrupt under the act of Congress of 1841, and that his estate, though in course of administration, is in such a situation as to afford no reasonable ground to expect that any dividend will ever be paid to the suing creditor, he will not be bound to await the final liquidation of the bankrupt's estate, before proceeding against the surety on the appeal bond.

APPEAL from the City Court of New Orleans, *Collins, J.*
Wray, for the plaintiffs.

Conklin, for the appellant.

SIMON, J. This is a contest between the assignees of a judgment heretofore obtained by the plaintiff against the defendants, and the surety on said defendants' appeal bond, given in the case reported in 4 Robinson, 78. Judgment having been rendered below against the surety, he has appealed.

It appears that after the return of our mandate to the court *a quâ* for execution, the plaintiffs took out a writ of *fieri facias*, which was returned by the sheriff "No property found;" whereupon the plaintiffs took a rule upon the appellant, to show cause why he should not be adjudged to pay the amount of the judgment affirmed by this tribunal. The surety answered by pleading that his principals had failed and presented their schedule in the United States District Court; that their estate was yet unsettled; and that, therefore, previous to being condemned, said surety claimed the benefit of discussion, in consequence of which said plaintiffs had no right of action against him, until it be shown judicially that the estate of said principals is insufficient to pay this claim. This plea prevailed in the lower court, and the rule was dismissed as prematurely obtained.

One year afterwards, the same rule was renewed, calling upon the surety to pay the full amount of the judgment, and

the same plea was opposed ; whereupon, after an investigation of the state of affairs of the insolvents, as shown by the record of their bankruptcy, supported by the testimony of the assignee of their estate, the court *a quâ*, being of opinion that there was nothing upon which the plea of discussion could have availed the surety, and that in fact said plea would be ineffectual, made the rule absolute, and condemned the surety to comply with his obligation.

We think the judge *a quo* did not err. It is true, in the case of *Chalaron v. McFarlane et al.* 9 La. 227, this court established the principle that, from the very nature of the obligation of sureties in appeal bonds, and the terms of their engagements, they derive the right of resisting a recourse on them until it is clearly shown by the creditor, that the sale of all the estate and effects of the principal has proved insufficient to discharge his demand. See also Code of Practice, art. 579, 596, and B. & C's. Dig. p. 181 § 23. But there is a vast difference between the present case, and that relied on by the appellant's counsel before the inferior court. In the latter case, certain lots, which had become the property of the mass of the principal's creditors, subject to said creditors' privileges and mortgages, were shown to be yet unsold, or their proceeds undisposed of, and still in pledge for the sale, the original price of which was to be paid out of their proceeds ; and it was held that the creditor should wait before exercising his recourse against the surety, until it was ascertained that the property surrendered was insufficient, as, for any thing that appeared in the record, said creditor might still be fully paid by the sale of the four lots. But this court never pretended to decide that, when the creditor shows that the principal's insolvent estate, though under a course of administration for the benefit of his creditors, is in such a situation as to produce nothing for the payment of his debts, that there is no reasonable expectation of the payment of any dividend to the suing creditor according to the rank under which he is to be placed on the tableau of distribution, and that, in fact, he has no hope of receiving any thing on account of his claim, he should be bound to do a vain thing, and wait until the final liquidation of an estate from which no benefit is

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to be derived, before being allowed to call upon the surety for a compliance with his obligation ; for then it would be sufficiently ascertained that the amount of the judgment *cannot be satisfied out of the sale of the principal's estate, real and personal*, according to the terms of the appeal bond.

Here, the evidence shows that the estate of the principal debtors is utterly insolvent and worthless; that a large portion of the property surrendered has been exhausted by seizures made previous to their application in bankruptcy ; that nothing could be done with the individual assets of Dubois ; that the lease of the theatre has produced no funds for the bankruptcy ; that there is no prospect of the judgment creditors having no special privilege, being paid ; and that in fact, after paying the costs and expenses, nothing will remain to pay the judgment creditors. We are perfectly satisfied that there would be no use in giving the appellant the benefit of his plea of discussion.

Judgment affirmed.

 SUCCESSION OF MARTIN DUPLESSIS—LOUIS LOMBARD, Appellant.

Certain slaves were directed to be emancipated by the will of the deceased, and the will was admitted to probate, and an executor qualified, who died without having executed any part of it. No executor was appointed in his place ; but the heirs, protesting against the validity of the will, took possession of the property, which they sold, including the slaves ordered to be set free. On an application by a third person to be appointed dative testamentary executor, alleging that the succession had not been finally administered upon, as the slaves had never been emancipated, which appointment was opposed by the heirs as unnecessary : *Held*, that the facts of the case show no necessity for the appointment of an executor ; that the slaves, having been sold and passed into the hands of others, their right to freedom, which has not been impaired by the course pursued by the heirs, must be asserted contradictorily with the persons who purchased them, who are entitled to an opportunity of showing the nullity of the will.

The admission of a will to probate, and the order for its execution, are but preliminary proceedings necessary to the administration of the estate ; and do not amount to a judgment binding on persons not parties thereto.

The decision in *Lewis' Heirs v. His Executors et al.* (5 La. 387), that while the judgment or order of a Court of Probates receiving a will, and ordering its execution, is

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unreversed, no other court can declare the will void, or prevent its execution, or examine collaterally into the correctness of the proceedings by which it was admitted to probate, must be understood as relating to cases where the validity of a will is attacked at the time of the order for its execution, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate; and not to actions of revendication in which property is claimed or withheld under a will. Courts of ordinary jurisdiction before whom such actions are brought, must necessarily be competent to decide on the validity of the will thus drawn in question.

APPEAL from the Court of Probates of Plaquemines, *Leonard, J. Lombard*, appellant, *pro se*.

Preston, for the heirs.

MORPHY, J. Martin Duplessis, a free man of color, died in the parish of Plaquemines on the 23d of June, 1833, leaving a nuncupative will under private signature, in which he made several specific legacies of property, and ordered the emancipation of the slave Sophie and her children. The will was admitted to probate, and was ordered to be executed, and Valfrey Duplessis, a brother of the deceased, was appointed dative testamentary executor, there being none appointed by the will. He died, in September, 1834, without having executed any part of the will, and no one was appointed in his place. The heirs of Martin Duplessis, after having made a kind of protest against the validity of the will, took possession of the property and slaves belonging to his succession, and sold all the property except Sophie and her children, whom they kept until the year 1842, when they proceeded to a partition before the District Court of the First District, and caused these slaves to be sold under an order of that court. On the 25th of March, 1844, L. Lombard petitioned the Court of Probates of the parish of Plaquemines, for letters of dative executorship, stating that the succession of Martin Duplessis had never been finally settled and administered upon, as the negress Sophie and her children had not been set free, as ordered by his will. This application was opposed by the heirs at law of the deceased. They deny that Martin Duplessis ever made any valid will; they alleged that he departed this life intestate; that they have taken possession of his succession, have made a partition of it, and have been in the peaceable and uninterrupted possession of the same for more

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than five years. On a hearing of the case, the application of Lombard was rejected, and he appealed.

The appellant has contended that the opposition of the heirs should not have been listened to, and he points to art. 972 of the Code of Practice, and art. 1112 of the Civil Code, which require that the party opposing an application of this kind, should allege a better right in himself than in the applicant. These articles do not, we apprehend, apply to a case like the present. The opponents do not claim the executorship for themselves, in opposition to the petitioner; but they say that there is no reason for making any appointment at all, because the will is invalid, and because they are and have been in possession of the estate for years. It is entirely unnecessary for us to enquire into the alleged invalidity of the will, as, upon another ground, we are of opinion that the application for letters testamentary was properly rejected. If Sophie and her children were yet in the possession of the heirs of Martin Duplessis, the fact of their having taken possession of the estate, some years ago, would afford no good ground for rejecting the application of the appellant, the special duty of an executor being to carry into effect the will of the testator, which it may be and is often the interest of the heirs to disregard. Thus article 1664 of the Civil Code provides, that if the heirs at any time wish to take from the executor the seizin of the estate, they must tender to him a sum sufficient to discharge the moveable legacies; and in the following article (1665), we find that "the testamentary executor is bound, even after the expiration of his seizin, to see the testament faithfully executed." In the present case, Sophie and her children are no longer in the possession of the heirs; they have been sold, and have passed into the hands of other persons, in disregard of whose apparent rights, the applicant, were he appointed executor, could not proceed to the emancipation of these slaves under the will. The right of Sophie and of her children to their freedom has not been lessened, nor in any way impaired by the course pursued by the heirs of the testator; but it must be asserted contradictorily with the person who bought them. If the will of the deceased be void, as is contended by the heirs at law, the purchasers of the property

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and slaves sold, must have an opportunity of showing such nullity. They cannot be estopped by the decree of the Court of Probates ordering its execution. This court has often held that the admission of a will to probate, and the order given for its execution, are only preliminary proceedings necessary for the administration of the estate, and do not amount to a judgment binding on those who are not parties thereto.

As to the case of *Lewis' Heirs v. His Executors et al.* (5 La. 387), upon which the appellant relies, we had occasion to say in *Robert v. Allier's Agent* (17 La. 15), that it must be understood as relating to cases, where the validity of a will is attacked at the time an order is made for execution, or even after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate; and not to actions of revendication, in which property is claimed, or withheld under a will. The courts of ordinary jurisdiction, before whom such actions are brought, must necessarily be competent to decide on the validity of the will thus drawn in question. 1 Rob. 116. 12 La. 214. 11 La. 385. Under this view of the case, we think, that there is no necessity or use for the appointment of an executor to the estate of Martin Duplessis, as there would be nothing under his control to be administered upon, all the property left by the deceased having been taken possession of, partitioned, and sold by the heirs at law.

Judgment affirmed.

THE BANK OF LOUISIANA v. JOSEPH FOWLER.

Under the 17th sect. of the act of 7th April, 1824, incorporating the Bank of Louisiana, which declares that if the bank "shall, at any time, suspend or refuse payment, in current money of the United States, of any of its notes, bills or obligations, or of any moneys received upon deposit, the holder of any such note, bill or obligation, or the person entitled to demand and receive such moneys, shall be entitled to interest thereon from the time of such suspension or refusal until the same shall be fully paid, at the rate of twelve per cent per annum," the holder of a claim can recover interest at that rate only from the time of a demand, or from the pe-

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ried when the bank was in default, and not from the date of a general suspension of specie payments, without such demand. This section does not apply to claims by a stockholder for dividends due by the bank. It was intended to provide for the public dealing with the bank, and not for the stockholders *inter se*. The legislature never intended to subject the stockholders to such a penalty towards each other, for not paying their dividends in specie.

Where one having money on deposit in a bank becomes indebted to it by the maturity of a note executed by him and held by the bank, compensation will take place, and the debts extinguish each other to the amount of the smaller of the two.

Between the parties, compensation, whether by operation of law or by way of exception, produces the same result. When it is ascertained that the parties are mutually indebted to each other at a particular time, from that moment the two debts are extinguished for equal amounts. C. C. 2204.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. The bank sues on a note drawn by the defendant, for thirty-six thousand dollars, secured by a pledge of four hundred and fifty shares of stock, due on the 6th day of July, 1837. The defendant admits the execution of the note, but pleads, in reconvention, that at the maturity of the note, and for a long time before, he had, on deposit in the bank, a large sum of money, which, with interest then due, according to law and the charter of the bank, amounted to more than sufficient to pay the note, and which the bank refused to accept in discharge thereof; and that, having for a long period previous suspended specie payments, it refused to pay the respondent his money so deposited, and still retains the same, whereby it has become liable to pay him interest at the rate of twelve per cent per annum up to this time, amounting in all to sixty-three thousand dollars and upwards; leaving a balance in his favor, after extinguishing the note, of \$16,862 05. He further claims for dividends declared by the bank, and not paid to him as a stockholder, \$6,084 10, with interest at the rate of twelve per cent. For these two sums he asks for judgment in reconvention.

The District Court allowed the interest on the defendant's deposit, from the first suspension of specie payments, May 13th, 1837, until July 6th, when the stock note fell due; at that time it allowed compensation, refused to give interest on the dividends, and rendered a judgment in favor of the defendant, on

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his reconventional demand, for about \$4000, including the dividends; and the defendant appealed.

The bank prays that the judgment may be amended, so as to reject the interest or damages, at twelve per cent from the suspension of specie payments up to the maturity of the note.

It appears in evidence, that when the note sued on fell due, the defendant, by his agent, drew a check for the amount, to which was appended a calculation of interest at twelve per cent, charged by him on the real amount on deposit, something less than the amount of the note. This was refused, because the bank would not allow the interest, and without it the deposit was less than the amount of the note. The same check was tendered to the notary when he demanded payment, previously to the protest.

Thus the pleadings and evidence present three questions for our consideration. 1st, Whether the court erred in allowing the interest at twelve per cent, up to the maturity of the note, from the suspension of payments in May, 1837; 2nd, whether compensation was properly allowed so as to stop the interest at the maturity of the stock note; and 3d, whether the defendant be entitled to recover interest at twelve per cent on the amount of his dividends.

I. The 17th section of the charter declares, that if the bank shall, at any time, suspend or refuse payment, in current money of the United States, of any of its notes, bills or obligations, or any moneys received upon deposit, the holder shall be entitled to recover interest thereon from the time of such suspension or refusal, until the same shall be fully paid, at the rate of twelve per cent per annum.

Under a similar provision in the charter of the Canal and Banking Company, we held, in the case of *Bartlett v. The Canal Bank* (1 Rob. 543), that the holder of a claim could recover the interest only from the time of a demand, or putting in default, and not from the period at which a general suspension of specie payments took place, without such demand. We can perceive no good reason for applying a different rule to the case now before us; and, consequently, our first enquiry is, whether such a demand had been made.

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It appears that on the 13th of May, 1837, when the bank, with five others, suspended, the defendant had on deposit, \$61,840 46, and that on the 6th of July, when the stock note fell due, the amount had been reduced, according to his own statement, by checks, to \$35,139 01, and during that period a general suspension of specie payments existed. A paying teller testified, that about the time the bank suspended, the defendant came to him, and witness told him they were paying only five dollar notes. Defendant got one changed for specie, and then asked witness if he would not pay him the amount of his deposit in specie. He further testifies, that the usual mode of making a demand is by presenting a check. This was a few days after the bank suspended. He cannot recollect if the defendant made a formal demand of payment of the deposit. It is so long since that witness cannot recollect precisely what passed. Mr. Fowler was in the habit of buying up the notes of the bank, and presenting them for specie. His demand, if any was made for the deposit, was in the way of a complaint against the bank. The cashier of the bank testified, that he did not recollect that Fowler had ever made a demand of him, or at the bank, for the payment of the deposit; but admits that the dividends were demanded. He thinks he would not have paid the deposit in specie, on the 14th May, without an order of the Board. On the 29th of May, the defendant addressed a letter to the president and directors, in which he complains that the president had, previously to the suspension, interfered to prevent his deposit being considered as a special one. He says that when he applied to make a special deposit, he assured the president that the amount set apart might be used, provided the bank would indemnify him in case of suspension. He concludes by saying, that he is constrained to demand the amount of damages, to which he is justly entitled. In another letter of the 8th of June, 1837, he complains that his various applications for a fair adjustment of his claim had been disregarded, and he enquires whether the bank is ready to settle with him in accordance with the 17th section of the charter. In no part of these letters does he intimate that he had demanded the restoration of the deposit, but he complains that the bank is unwill-

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ling to pay the damages according to the 17th section of the charter, and that they had refused to convert his into a *special* deposit, on or about the 29th of April. He says, in one of these letters, "although fully persuaded, for some time before I made the application for a special deposit, that not only the bank of Louisiana, but every other bank in the city would have to suspend payment, I did not certainly, after what passed between the president of that bank and myself, for a moment believe, that the Board would, in case of suspension, hesitate to indemnify me for my loss;" &c. From the tenor of these letters, it would appear that the defendant based his claim for damages upon the refusal of the bank to make a special deposit of the balance due to him. On the 9th of June, he again asks for an adjustment of his account according to the 17th section of the charter.

The question put to the teller, does not, in our opinion, amount to a demand of payment, because no check was offered or receipt tendered, and it is the duty of the teller to pay checks, and not to answer enquiries of that kind. If the defendant had presented a check, or made a regular demand for the payment of his deposit, he would have laid a legal foundation for his claim for interest at twelve per cent. This he does not appear to have done; and between the 13th of May and the maturity of his note, he appears to have drawn out, on his checks, nearly thirty thousand dollars.

We conclude that the court erred in allowing the damages, without proof of a demand of payment.

II. Between the parties, compensation, whether by operation of law or by way of exception, produces the same result. When it is ascertained that the parties are mutually indebted to each other, at a particular time, from that time the two debts are extinguished for equal amounts. Civil Code. art. 2204. Thus, even if the deposit had borne interest at twelve per cent, as soon as the stock note fell due the debt itself would have become extinct to the amount of that note, and the interest would have ceased to run. It may be otherwise as to third persons who acquired rights before compensation allowed on exception, and when not produced by mere operation of law. Even

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if this were doubtful as a general rule, the 20th rule or by-law of the bank declares "that all notes discounted shall be charged to the account of the payer when due, provided there are funds in bank to the credit of such person or persons, and he or they neglect to have the same taken up before the shutting of the bank on the last day of grace." Consequently the bank was authorized on the 6th July, to apply the fund on deposit to the payment of the stock note.

III. The last enquiry is, whether the defendant was entitled to interest at twelve per cent on the amount of his dividends as a stockholder, from the time of his demand of payment in specie and notarial protest. On this point we concur with the court below, that the provisions of the 17th section of the charter do not apply to dividends. The legislature intended to provide for the public dealing with the bank, and not for the stockholders *inter se*; and it could not have been contemplated that, while the circulation of the bank was not redeemed in current money of the United States, the bank could declare a dividend of profits, much less that the stockholders should incur towards each other a high penalty for not paying such dividends in specie.

According to this view of the case, the amount on deposit on the 6th of July, 1837, being imputed to the payment of the stock note, left a balance upon which interest is chargeable until the first dividend, Feb. 6, 1838, when the amount of the dividend was extinguished *pro tanto*, leaving a balance in favor of the plaintiff in reconvention, which added to the second dividend, due in August, of \$1,800, gives a total of \$3,156 45, for which he is entitled to judgment.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and ours is that the defendant, as plaintiff in reconvention, recover of the Bank of Louisiana, three thousand one hundred and fifty-six dollars and forty-five cents, with interest at six per cent from the 22d day of August, 1838, on the sum of \$1,800; and on the balance, from the 6th of February, 1838, until paid, and the costs in the District Court; those of the appeal to be paid by the defendant and appellant.

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THOMAS McCARGO v. THE NEW ORLEANS INSURANCE COMPANY.

Where a policy of insurance recites that the "insurers shall not be liable for mutiny," the mutiny is but an excepted risk. So, where the language of the policy is "*warranted* free from *insurrection*," it does not create a technical warranty, but only exempts the insurers from liability on account of losses which may be sustained in consequence of an insurrection or mutiny. In common parlance, there is little or no difference between mutiny and insurrection; and the word *warranted* is often used where there is no warranty in fact.

A vessel on the high seas, in time of peace, engaged in a lawful voyage, is under the exclusive jurisdiction of the State to which her flag belongs; as much so, as if constituting a part of its own domain. If forced by any unavoidable cause into a port of a friendly power, she loses none of the rights appertaining to her on the high seas, but herself and cargo, and the persons on board, with their property and all the rights incident to their personal relations, as established by the laws of the State to which they belong, are placed under the protection which the laws of nations extend to the unfortunate under such circumstances. Although the jurisdiction of the nation over the vessel belonging to it is not wholly exclusive; and though, for any unlawful acts committed, while in such a situation, by the master, crew, or owners, she and they may be responsible to the laws of the place, yet the local law does not supersede the laws of the country to which the vessel belongs, so far as relates to the rights, duties and obligations of those on board.

Where slaves shipped from one port of the United States to another, rise upon the officers of the vessel, and take her into a British port, they will be considered still as slaves, though in a state of insurrection. *Per Curiam*: They did not cease to be the property of their owners, though in a state of insurrection, and though the right of property could not be asserted in a British court, nor enjoyed within the exclusive influence of British laws.

The *last* cause of a loss is not necessarily the *proximate* cause.

All the consequences naturally flowing from a peril insured against, or incident thereto, are properly attributable to the peril itself.

Where the insurers of a cargo of slaves are exempted, by the policy, from the risk of insurrection, and the slaves take possession of the vessel by force, turn her from her course, and enter a British port, where they escape, the insurrection must be considered as the cause of the breaking up of the voyage, and the insurers will not be liable.

In principle there is no difference between a successful insurrection of slaves, who form themselves the subject of the insurance, and a capture by an enemy, which, *prima facie*, amounts to a total loss.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

The petitioner alleges that the defendants are indebted to him in the sum of \$20,800, with interest thereon, at five per cent a year, from judicial demand, for this; That defendants did, by a

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policy dated at New Orleans, the 16th November, 1841, in consideration of the premium then and there paid to them, insure from Norfolk to New Orleans, certain slaves belonging to him, (twenty-six in number,) valued at \$800 each, shipped on the brig *Creole*, beginning the adventure from and immediately after the placing of the slaves on board of the *Creole* at Norfolk, and continuing it until they should be safely landed at New Orleans. It is averred that the defendants took upon themselves all the perils of pirates, takings at sea, arrests, restraints, and detainments of all kings, princes, or people of what nation soever, all risks of foreign influence, and all other perils, losses and misfortunes that had or might thereafter arise to the hurt, detriment, or damage of the said slaves, as will appear from the policy annexed to the petition; that plaintiff was at the time of the execution of the policy, and still is the owner of the slaves; that about the 30th of October, 1841, the *Creole* sailed from Norfolk on her voyage, with the twenty-six slaves on board; that she was staunch, and well manned and provided for the voyage; that she had proceeded in the prosecution of her voyage to a point about one hundred and thirty miles north-north-east of the *Hole-in-the-Wall*, "when by reason of an affray and disobedience of about nineteen slaves on board, all of which were other than those described in the said list, (for the insurance on whom this suit was brought), the said vessel proceeded to the port of Nassau, in the Island of New Providence, within the dominions of Her Majesty, the Queen of Great Britain and Ireland, when, between the 10th and 18th of November, both inclusive, the public authorities and other agents of Her Majesty aforesaid interfered with said slaves, captured, seized, detained and emancipated them, whereby the said slaves were all totally lost by the risks insured against in said policy, to wit, foreign interference and pirates, the takings at sea, arrests, restraints, and detainments of all kings, princes, or people of what nation, condition, or quality soever, and all other risks, and all other perils, losses and misfortunes that then had, or might thereafter come to the hurt, detriment or damage of the said slaves, or any part thereof."

It is further averred, that said slaves were not lost by their

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own elopement, insurrection, or natural death; that since the said loss the plaintiff duly informed the defendants thereof; that he has made the preliminary proof required by said policy; has made to the defendants a full and entire abandonment of said slaves; and demands payment of the value thereof, as fixed by the policy for the total loss of said slaves. The petition concludes with a prayer for general relief, &c.

A list of the names of the slaves, their ages, color, height, and sex, was annexed to the petition.

The answer denied generally all the allegations in the petition, except that of the execution of the policy. It denied specially that the plaintiff had complied with the warranties with which he was bound to comply.

The proposal for insurance, offered in evidence by the plaintiff, states that: "Insurance is wanted against all risks, and chiefly against foreign interference on twenty-six negroes, at \$800 each, on board the brig Creole, Henshaw, at and from Norfolk to New Orleans—warranted by the assured free from elopement, insurrection, or natural death."

The policy introduced in evidence recites that: "Thomas McCargo, on account of whom it may concern, does make insurance, and cause to be insured, lost or not lost, at and from Norfolk to New Orleans, upon all kinds of lawful goods and merchandize, laden or to be laden on board the good brig Creole, whereof is master for this voyage Henshaw, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel or the master is or shall be named or called, beginning the adventure upon the said goods and merchandize from and immediately following the loading thereof on board of the said vessel at Norfolk aforesaid, and so shall continue and endure until the said goods and merchandize shall be safely landed at New Orleans aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance," &c.

"Touching the adventures and perils which the New Orleans Insurance Company of New Orleans is contented to bear and take upon itself in this voyage, they are of the sea, men of war,

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fires, enemies, pirates, rovers, thieves, jettison, letters of mart and counter-mart, surprizals, takings at sea, arrests, restraints, and detainerments of all kings, princes, or people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandize, or any part thereof. And in case of any loss or misfortune it shall be lawful and necessary to and for the assured, his factors, servants, and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said goods and merchandize, or any part thereof, without prejudice to this insurance, to the charges whereof the said Insurance Company will contribute according to the rate and quantity of the sum herein insured, having been paid the consideration for this assurance by the assured or his assigns, at and after the rate of two per cent; and in case of loss the assured to abate two per cent, and such loss to be paid in thirty days after proof of loss and adjustment thereof, and proof of interest in the said shipment, the amount of the note given for the premium, if unpaid, being first deducted," &c.

"Twenty thousand eight hundred dollars value on twenty-six negroes, at \$800 each; and this policy covers all risks, and provides chiefly against that of foreign interference; but warranted by the assured free from elopement, insurrection and natural death."

The premium was admitted to have been paid.

The abandonment was offered in evidence by the plaintiff, and the defendants admitted that they had received it within a day or two after its date, (8 December, 1841). The record states that the abandonment was offered and received merely to show that an abandonment was tendered by the plaintiff to the defendants. The bill of lading for the slaves was also introduced by the plaintiff.

The concurrent testimony of all the witnesses established the facts that the insurrection was successful, and that, under the orders of the insurgents, the brig, when she reached the Hole-in-the-Wall, was turned from her course towards New Orleans, and taken into Nassau, in the Island of New Providence.

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Gifford, a witness for the plaintiff, testified* that he left Richmond on the 17th October, in the brig *Creole*, as chief mate—has been following the sea for thirteen years. On looking at the bill of lading he recognizes the names of some of the negroes mentioned therein—Madison Washington, Elijah Morris, Pompey Garrison, and Andrew Jackson as the slaves of the plaintiff, and of the number put on board by him; the other negroes, to about the number stated in the first bill of lading, were called and considered as the slaves of the plaintiff. Mr. Hewell was on board acting as agent of plaintiff; we took on board the greater part of the slaves on the 20th, and one or two more a day, till the 25th; on the 25th we left Richmond. The captain left the brig in the river on the 27th, and proceeded to Norfolk by the steamboat. The *Creole* was detained in Hampton Roads one day, when we took in the balance of the slaves. The tobacco was taken in at Richmond. The *Creole* left Hampton Roads on the 31st of October; we got to sea on that day. The *Creole* was well manned, and prepared with every thing for carrying slaves; she was twelve or fourteen months old. After putting to sea the negro women were put in the after hold of the vessel, and the men in the fore hold; between these were stored the cargo of boxes of manufactured tobacco. Hewell and Merritt together attended to the negroes. As far as he knows every precaution was taken to prevent insubordination on the part of the negroes. The men were allowed to come on deck night and day if they wished. From the time of leaving Richmond until the night of the riot the negroes behaved as well as they could behave; saw nothing like insubordination among the slaves until that time. The night of this riot we hove to about eight o'clock off Abaco; it was deponent's first watch on deck, and was on deck with three of the seamen—Blinn Curtis, Henry Speck, and Jack Lecompts. Between nine and half-past, Elijah Morris came to deponent on deck, and told him that one of the negro men had gone down to the hold where the women were. Deponent called Merritt, one of the agents on board, who was in the cabin asleep. Merritt came out with deponent, bringing with him a lamp and match; Merritt went in the hold and lit the lamp; deponent staid on deck on the hatch, to see if

* This testimony, and that of the other witnesses, was taken under commissions. When about to be introduced, defendants' counsel stated that the depositions contained much hearsay, and other illegal evidence, such as statements of the contents of notes, letters, &c., not produced, which was so blended with what was legal, that it could not be separated without great delay, when it was agreed that the judge should instruct the jury that they must consider so much of the evidence as is hearsay, or refers to the contents of letters, notes, or written instruments not produced, as rejected by the court.

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any one did not come out. Merritt, by lighting the lamp, enabled us to see Madison Washington, a slave of the plaintiff, in the hold among the women. Merritt asked Madison what he was doing there, who gave no reply, as deponent heard. He then asked of him if he knew the consequences of being down there; he replied that he did, and sprang for the hatchway to come on deck. As he got on the steps to come up, Merritt seized him by the legs and deponent by the shoulders, but being a powerful man he soon got away from us. As Madison got on top of the hatchway he shoved deponent back from him. Deponent told him to stop; he replied that he could not stay there, he must go on deck. It was the rule to whip the negro men if they went into the hold with the women, and these were the consequences of which Merritt spoke when he addressed Madison as above. When deponent and Merritt took hold of Madison, he believes, from the appearance and manner of Madison, that he thought they took hold of him to punish him. When he pushed deponent off, he appeared much excited, and, being a powerful man, easily disengaged himself from deponent. Instantly after Madison disengaged himself, a pistol was fired at deponent, the ball grazing the back part of his head. Deponent then went to the cabin to call all hands, the cabin passengers, &c. He awaked the captain, passengers, and second mate below, but before he got below, Madison, or Elijah Morris, from his voice, and some four or five others followed him as he went to the cabin. Madison called to the rest, to come on; as they had commenced, they must go through with it. The captain jumped out and seized his bowie knife, as he understood, and Mr. Hewell, a musket. We all started then on deck and met the negroes near the cabin door. The fight then commenced; Hewell fired the musket, and soon after it was fired the negroes wrenched it from him. Hewell, he thinks, then seized a handspike, and fought with that about a minute, when it was also taken from him; he was then stabbed in a number of places, and staggered back in the cabin, and it was the last that deponent saw of him; presumes he was stabbed with the captain's bowie knife, by Madison or Ben Blacksmith. Deponent received several blows from the negroes with sticks or clubs; his clothes were cut across the breast with a large knife, which he thinks was used for the purpose of cutting meat. This knife of the cook's was usually left in the galley, where it could be picked up by any one; the handspikes were left forward by the windlass, where they could be picked up by any one passing in that direction. There were three or four pistol discharges the night of the riot; thinks he heard three or four discharges of fire-arms besides the musket; the pistols in pos-

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session of the negroes were large sized pocket pistols. After arriving at Nassau, three of the knives of the seamen were found in the possession of the negroes; cannot say whether these knives were taken during the scuffle or not. Saw one of the seamen, Blinn Curtis, knocked down at the door of the cabin by one of the negroes, and fall into the cabin. At that time deponent retreated to the main top, and captain Ensor followed him soon after to the maintop, and on getting there, told deponent that he was badly stabbed and was dying. Deponent could then hear the threats of the negroes to kill all hands. Heard Madison Washington telling the rest to kill every white man, and not to let one escape. Three or four of the negroes then went aft to kill the Frenchman at the wheel. Madison Washington told them not to hurt him, he was a Frenchman, and could not speak a word of English. They then searched the vessel fore and aft, to see if they could find any more white people. They threw water down the sky-light, and put the lights out in the cabin. They then stationed men in different parts of the vessel to look out for us; the orders were to kill us. They then made one of the sailors bring in the lantern from the bowsprit, being there to prevent vessels from running into us. They took this lantern and went into the cabin to search it. He supposes that about a minute after they brought Mr. Hewell on deck, they cut his head off as near as they could with a knife (he was then dead); and the one who cut his head off, stated—"we will separate the old son of a bitch somehow." They then threw him overboard from a port-hole. They then remained still for some time, only passing about the deck occasionally, with a lantern. By this time it was probably one or two o'clock at night; saw nothing more until five o'clock, A. M.; could hear the negroes talking below in the cabin, but not what they said. At five o'clock, A. M., they saw deponent in the main top, and called him down, and said if he did not come down they would shoot him; they then had a loaded musket in their hands. Deponent stepped on deck and said: "I am here now, you can do with me what you please." One of them held the musket to his breast. Another told him he must take them to Abaco, or some other English island, or they would shoot him, and put him overboard. They asked deponent then where captain Ensor was? He replied, "in the main top;" the witness having fastened him there during the night to prevent him from falling out, as the vessel was rolling heavily. Deponent said that the captain was helpless from his wounds, and asked the privilege to bring him on deck. One of them replied, "damn him, let him stay there till daylight, and we will then finish him." They then had some talk among themselves

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for a few minutes, and then told deponent to bring the captain down—we then brought him on deck, and laid him on a mat-trass on the quarter deck. The negroes then took him and put him in the fore hold—some four or five of them, under the direction of Madison and Elijah Morris. They then put Mr. Ensor and Mr. Stevens, second mate, also in the hold—they then put the grating on and locked it, and put negroes to watch it. It was then about 6 A. M., and they remained in the hold till about five in the evening, except Stevens, who was let out at 11 o'clock A. M. Blacksmith then remarked that they would leave them there till night, and then put them overboard. After this affray the nineteen who were identified and put in prison at Nassau, were the negroes who took possession of the brig. These nineteen kept strict orders over the rest of the negroes, exercising the same sway over the rest of the negroes that they did over the whites, threatening to whip them if they disobeyed their orders. They appointed another cook for the negroes, Madison having been the former cook. The nineteen took possession of the vessel, stationed in different parts of the vessel. None but the nineteen came into the cabin; this was their head quarters; they drank the liquor out of the cabin; heard them invite none of the other negroes into the cabin. Ben Blacksmith had the captain's bowie knife in the morning; Elijah Morris had then a knife also: this was just before we made sail. There was in the cabin when they took him to explain the chart to them, the four negroes—Ben Blacksmith, Elijah Morris, D. Ruffin and Madison Washington. Neither D. Ruffin nor Madison, at that time, had knives or any weapons with them. Deponent explained the chart, and showed them about where we were. They said they wished to go to Abaco; at sunrise we made sail. They forbid the white persons from talking together; Elijah Morris saying, if he saw them talk together, he would throw them overboard. Blacksmith, Morris, Ruffin and Madison were appointed by the rest of the nineteen as the managers. They gave all the orders with the exception of working the vessel, which they ordered deponent to do, they not understanding it. They were in all parts of the vessel, keeping the others in subjection, &c. D. Ruffin watched the compass, to see that we did not alter our course. Madison and Elijah Morris together threatened death if we should deceive them, or change the direction of the vessel. When Ruffin saw deponent and Merritt writing on the slate the altitude, the ship's time, he ordered it to be rubbed out, being afraid that we should communicate with each other in that way. Two of these four managers had knives which they kept out the whole time after the affray, and several others of the nineteen had

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knives and pistols, (three pistols,) all of which they threw overboard, excepting one pistol, at the mouth of Nassau harbor; they were thrown overboard to prevent their being seen. Madison Washington came aft and told them all to give their arms to him, to have them thrown overboard, so that none might be seen when they arrived at Nassau. One pistol was all that was left when they arrived, besides the musket belonging to deponent. Mr. Hewell's knife was afterwards found where they had put it in the fire, in their cooking apartment, to destroy it. All the rest of the negroes were kept under by the nineteen, till we arrived at Nassau, where we arrived on Tuesday morning, the 9th November. On our arrival a black pilot came on board about one mile outside of the light house; this was one of the regularly authorized pilots there. When they came on board they mingled with the negroes, all being black. As the pilot was bringing the vessel to in the harbor, the quarantine officer came along side with his boat. Deponent jumped into his boat, and told him the cause of our coming in there, and asked him to put deponent on shore and to watch the vessel, and to let them have no communication with the shore till he returned. He then accompanied deponent to the American Consul. The officer watched the vessel, and deponent and the Consul went to see the Governor of Nassau, and saw him at his house, and stated the case to him. The Consul then asked protection to guard the vessel till something could be done. Deponent related to the Governor all the facts as they occurred, which the Governor wrote down. The Consul asked him if he would send some soldiers on board to guard the vessel, cargo, and passengers and crew, till something could be done, which was done. The Governor sent a company of Africans with a white officer; twenty-two privates, he thinks there were, together with a black corporal and sergeant. The officer in command was called captain Mins. These soldiers when they came on board, put the men forward and the women aft; they then tied Ben Blacksmith, Madison Washington, D. Ruffin and Elijah Morris, and confined them in the long boat on deck, where they were kept until the slaves were liberated. The guard remained on board, being changed every morning at nine o'clock, officers and soldiers. They took and kept entire possession of the vessel. It was the day after the arrival at Nassau, that the magistrates came on board, and took deponent's, Merritt's, and Stevens, the 2nd mate's, depositions. The next day they came off and took the deposition of one or two of the crew. On Friday morning, they came off again, and finished the depositions. Previous to their coming off that morning, the civil authorities had hired what boats they could find in the harbor, and manned them with ne-

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groes; and these negroes in the boats were armed with clubs. There were then, he presumes, 1500 negroes on shore; the shore was then lined with negroes and some few whites. The American Consul asked the Governor to protect the vessel, until he could send to Indian Key for a man-of-war to come and take the vessel, &c., and bring them to New Orleans. The Consul informed deponent that he had made this request; deponent did not hear it made. The interviews between the Consul and the Governor took place at the Government House, on Friday morning. The Consul then asked deponent if he would take charge of the Creole and the rest of the slaves, excepting the nineteen, and bring them to New Orleans. The Consul then stated that he had applied to the Governor to take out the nineteen, and to put such arms on board as were necessary, and to get the crew out of the other American vessels that were there, which the Governor (as the Consul told deponent,) refused to do. Deponent then came on board in company with Captain Woodside, and found there the Attorney General of the Island, with three or four magistrates, the same who had taken the depositions previously; the boats were then all around the vessel, being a regular musquito fleet, numbering some fifty or sixty boats. There was also a large sloop towed from the shore, and anchored near the brig, manned with about a dozen negroes, all armed with bludgeons. The soldiers, twenty-four blacks, with their white officers, were then on board of the Creole. After the depositions were finished, the magistrates then picked out the nineteen who were identified, and put them under the custody of the guards—the African soldiers on the quarter deck. The boats lying about were under the orders of the Attorney General and the magistrates, and the blacks appeared to be under the direction of the black pilot. He appeared to be captain over the blacks, and all were waiting the orders of the Attorney General and the magistrates. The general talk on shore was that the civil authorities on shore had hired all the boats, &c. to take possession of the Creole and liberate the slaves on board. The soldiers on board had muskets; the officers and soldiers were in full British uniform; sentries were placed about the brig by the officers having command on board. No one excepting deponent and the crew, the consul and civil authorities, were allowed to come on board the Creole. The negroes of the Island had been allowed to come on board the day we arrived, and allowed to mingle with the slaves on board. Deponent asked the British officer on board to prevent the negroes of the Island from coming on board and talking with the slaves. They were not allowed to come on board any more, from that time till the slaves were liberated. The English offi-

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cers had control over the vessel. Each day that the guard came on board, they were drawn up on the quarter deck by the officers, and loaded their muskets with powder and balls, and fixed their bayonets. Each company had four rounds of cartridges; soldiers all well disciplined. When the Attorney General and the magistrates came on board, the military company were all under arms. After they had possession of the nineteen, the Attorney General and the magistrate, a Baptist preacher, (he believes he was,) and one or two other white men who accompanied the magistrate and preacher on board, stepped to the quarter deck: one of the magistrates told the second mate and some of the men if they had any money or clothes, they had better lock them up, as he did not know but the cabin would be robbed by the negroes. They were frightened, and each one went to secure his own clothing and effects. One of the passengers put on four pair of pantaloons, another put on two suits. They locked their trunks and put them in the state rooms, and took care of every thing they had. Then the Attorney General stepped on the forward part of the quarter deck and addressed himself to the negroes: "My friends," said he, "you have all been detained on board of the Creole in the port of Nassau a short time to know who was most engaged in the murder of Mr. Hewell, and attempting to kill the captain, mate and crew. We have ascertained that, and identified nineteen: and the rest of you are all free and at liberty to go ashore, and go where you please." Witness then said to him: "We have been once nearly killed by these slaves, and we see from your people that they intend to show fight, and we want to be protected, vessel, crew and cargo. I protest against any of these boats coming alongside of the brig, or the slaves going on shore from the brig." He answered: "You had better not object to it; you had better let them go quietly ashore; if you object, I am afraid there will be blood shed." He then spoke to the nineteen on the quarter deck, and said: "Here are nineteen of you that are identified as being engaged in this affray, and you will be lodged in prison till we can communicate to England to know whether you will be tried here or elsewhere." The Attorney General then made a signal for the musquito fleet to come alongside, by raising his hand. He and one of the magistrates then got into his boat and shoved off from the brig a short distance. On the signal being given, the boats made a general rush alongside of the brig, shouting and huzzaing; two of the magistrates and the Baptist minister remaining on board. Witness asked them not to allow any of the negroes to come out of the boats on board of the brig. The magistrate told them not to come on board, and told the slaves on board to get over the side into the

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boats, and one of the magistrates stood in the gangway and helped them over the side into the boats. After all had got into the boats, except the five who remained on board and came to New Orleans, the whole fleet shoved off a little way from the brig, gave three cheers, and went ashore. The Attorney General and officers, after the negroes from the brig got into the boats, shook hands with the negroes, congratulating them on their liberation. The Attorney General and one of the magistrates were lying with their boats at a small distance, witnessing the proceedings, whilst the negroes were getting out of the brig into the boats. About five minutes before the signal was given by the Attorney General for the fleet to approach, the black pilot who was in his boat, cried out to the magistrates who were on board : "I wish you would hurry there. You have "had your time, and we want ours." During this time the officers and company remained under arms on board. A half an hour after the negroes went ashore, the boat was sent from the barracks alongside of the brig, took out the prisoners and guards, took them ashore, and the nineteen were marched to prison. The brig lay about 150 yards from the wharf. When they first anchored it was in the outer roads about a mile from the shore ; they lay there two days, and by order of the harbor master were warped up to within about 150 yards of the wharf. On the day they arrived at Nassau, Captain Woodside, master of the barque Louisa, of Portland, came on board the Creole with the American Consul. Captain Woodside proposed to come on board himself, bring part of his crew and the second mate. He offered to assist in taking charge of the vessel, and to help to master the slaves, and take the vessel to Indian Key, where they could have got aid from the revenue cutter or a man-of-war of the United States. They knew there was one there, as there is always one stationed there. The American Consul then proposed to get the crew of the brig Congress of New York, then lying dismasted at Nassau, to assist in taking the vessel to Indian Key with the slaves on board. Witness agreed to this, and agreed to take charge of the vessel, which was requested of him by the American Consul. The Consul and witness went ashore to purchase arms. Those who had them in Nassau refused to sell them. They knew witness, as did every body in Nassau, in 24 hours. When witness walked in the streets, the inhabitants, both whites and negroes, would say : "There goes one of the "damned pirates and slavers." After trying to purchase arms, the Consul and witness continued every day to have interviews with Captain Woodside till the slaves were sent ashore. The force was to come on board when wanted ; and when they could not buy any arms it was agreed, that they should have

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three muskets and three cutlasses from the brig Congress. There were no arms on board the Louisa, except a pair of horse-pistols, which Captain Woodside was to bring on board. It was intended whenever the nineteen slaves should be taken out of the brig, that witness and the aid he was to receive, should take possession of the brig and remaining slaves, and bring them to Indian Key, for which purpose their force would have been sufficient. On Friday, the day that the slaves were liberated, witness was on shore with the American Consul, when he saw Captain Woodside with his force in the boat and the arms they had procured from the brig Congress, go from the Congress to the Creole. Witness saw her stop and lay off a few minutes, when she approached the Creole and then went to the shore, and Captain Woodside landed, and the boat then went back to the Congress and put out the arms. Witness was then ashore with the American Consul on a visit to the Governor. Captain Woodside repeated to them that he had been to the brig, and that the British officer in command would not let them come on board. This was about two hours before the slaves were liberated. If Captain Woodside and his men had been permitted, they would have been in sufficient force to take the brig to Indian Key, with the remaining slaves. Witness thinks Captain Woodside as determined a man as he ever saw in his life. All the sailors in port, those of the Louisa and Congress, were all anxious to come on board, and assist in rescuing the brig, and carrying her and the slaves to Indian Key. They were all Americans, who took a deep interest in rescuing the negroes from the island, and bringing them to Indian Key on the coast of Florida. If there had been no interference of the English authorities, the negroes would have been brought to New Orleans certainly. That interference has caused the loss of the negroes. The affray would not have prevented the negroes from being brought to New Orleans, had it not been for the interference of the authorities. The negroes had no arms at Nassau, (they had been thrown overboard,) and might have been easily overcome, and there was nothing in the way of our bringing the negroes to New Orleans except the British authorities. Captain Ensor and deponent, and all of the crew except three, are Americans; one of the three was a Portuguese, one a Dutchman, and the other a Frenchman. Saw nothing in the conduct of the others than the nineteen, that seemed to manifest any disposition to take part in the affray. None but the nineteen went on the quarter deck after the affray, except such as were sent there by the nineteen on some business. The others went into the hold as usual, and continued doing in all respects just as they did before the affray. After the negroes were liberated, some of them

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wished to come to New Orleans, but said they were afraid to come through fear of being killed by the other negroes.

Witness and the others on board of the Creole were afraid of their lives. It is deponent's opinion that the Governor knew all the transactions at Nassau, from the time of our arrival there until we sailed. This opinion is derived from what he saw there—from the actions of the magistrates, the interview with the Governor, and the talk of the people on shore. The authorities and the people there appeared to be acting in concert. The officer in command put on board the second day, Captain Fitzgerald, stated in the evening on deck, (while his arms were round a mulatto girl,) to the negroes, that they were all fools not to have killed all hands when they had a chance, and run the vessel on shore, and then they would have all been free without any further trouble. When the magistrates came on board they did not appear to be under the direction of the military officer on board. When the magistrates and the Attorney General were on board, and the slaves were liberated, then the military officers appeared to be under the directions of the Attorney General. After the slaves were liberated on Friday, on Saturday or Monday, the Attorney General wrote a letter to Captain Ensor; the American Consul has the letter. Deponent received the letter; the purport of it was, that the slaves had all been to him and made oath that they had left their baggage on board, and that they wanted it, and asking that he would intercede in their behalf in getting it. Deponent answered the letter; stating that there was no baggage on board belonging to the slaves, that he knew of; and if they had any, it belonged to their owners; that they were slaves, and whatever they left on board belonged to their owners; and that he should deliver nothing without a permit from the Custom-House, and an order from the American Consul. Witness received the letter as master of the Creole, as it was addressed to Captain Ensor, as master. The Attorney General then got a permit from the Custom House, and sent an officer on board, and ordered deponent to land the baggage in the brig's boat. This permit was sent by an order of a Custom-House officer. Deponent refused to do it, saying he would not land any thing in the brig's boat, saying that they must get their own boat if they wanted the baggage brought on shore. The Custom-House officer then got a boat from the shore, a barge, which he thinks belongs to the Custom-House, and carried all the baggage of the negroes ashore, and a bale of blankets which had never been opened. The next day (Tuesday, 16th.) deponent wanted to sell a few barrels of provisions to pay our expenses in lying there, (having more provisions than we wanted for the remainder of the voyage.) The pro-

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visions consisted of beef, pork and navy bread. Deponent applied at the Custom-House, to the collector of customs, for the privilege of entering them, but he refused to let us do so, unless we entered the slaves on the Creole as passengers; refusing to allow them to be entered as slaves. Deponent refused to enter them as passengers. It is never necessary to enter more of the cargo than you wish to dispose of; could see no other object in their refusal than to get us to enter the slaves as passengers. In the letter of the Attorney General above spoken of, the negroes were spoken of as passengers. Deponent saw the slaves about Nassau for four or five days after they were liberated; conversed with several of them whom witness met in the streets every day; all the slaves whom he conversed with expressed a willingness to come to New Orleans, but stated they were afraid of the inhabitants of the island. A mulatto girl belonging to plaintiff, and another girl called Pinckey, wished to be smuggled on board in order to come to New Orleans. This he could not do, in consequence of the brig lying so near the barracks, where a sentry was kept all the time. We were lying within half a gun shot of the barracks, just at the mouth of the fort. The threats of the people on shore, that the slaves should not go away, and if any of them should be attempted to be taken away by us, that they would sink the vessel, with other circumstances above mentioned, deterred us from smuggling any slaves on board. There was a vessel put up for Jamaica the day after the slaves were liberated; an advertisement to that effect appeared in the paper published at Nassau, and passage was free for such as would go. There are two papers published at Nassau, the Royal Gazette and the Royal Observer. Deponent was told by the American Consul, and Mr. Stark, agent for the Baltimore and Boston Insurance Companies, he believes, that this vessel was put up by the authorities at Nassau, to carry the slaves who came on board the Creole to Jamaica, and such was the general understanding among all whom he conversed with on shore. That vessel had not sailed at the time deponent left Nassau. Deponent left the Thursday after the negroes were liberated; they were liberated on Friday; on Wednesday previous to the day of sailing, cleared from the Custom-House. On clearing deponent had to make oath that he would bring away no British subjects from the island, under the penalty of \$2,000 and twelve months' imprisonment; such an oath is usual there; has never taken such an oath elsewhere. Deponent considered that this oath applied to the slaves, whom the authorities considered as English subjects, he presumes. Five of the slaves came to New Orleans with deponent; these five never went ashore. The ne-

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groes from on shore, after the others were liberated, tried to get them ashore, but we forbid them. The black pilot, for one, took great interest in getting them on shore. The oath that deponent took only applied to bringing off British subjects from the island; did not in any way consider it to apply to these five, because they had never been on shore. It was part of the arrangement that the chief mate and second mate and four of the men of the Congress, Captain Woodside, his second mate and three of his men, and more if necessary, were to come on board and assist in bringing all the slaves to Indian Key. The Captain of the Congress had left his vessel, and gone home to New York. Deponent left one of his crew at Nassau; forgets his name; he was called Charles on board. We took on board, at Nassau, two American seamen to come to New Orleans, named Peter and Mike; these were under the hands of the Consul when we arrived there. We also brought on the second mate of the Congress as our second mate; the two shipped at Nassau have left New Orleans; all the other seamen, excepting the one left at Nassau and Jack Lecompts, the Frenchman, are still with deponent. The American Consul told deponent that the day before the Creole sailed, he had made application to the Governor to send the slaves, identified with the affray, to New Orleans for trial, which the Governor refused to do. We were detained one day in waiting for the Governor's answer. In the morning of the arrival of the Creole, in a conversation between deponent, the Governor and the American Consul, the Governor stated as soon as the slaves got their foot on the island, they would be free. Two of the five slaves who came with us to Orleans, and had remained in the cabin, on the voyage from Richmond to Nassau, appeared to be crying, and did not know what to do. One of them was a woman, perhaps thirty years of age, named Rachel Glover; the other, Mary, a mulatto girl, about thirteen years of age; the other two women had been in the hold all the voyage, and remained in the hold until all the others had left the vessel, saying that they did not wish such freedom as there was there; they preferred coming to their masters. The boy, making the fifth, was the son of one of the women in the cabin.

When the Creole left Nassau, the Captain was still sick and helpless. In coming from Richmond, they passed by Norfolk, leaving it 12 miles to the right in going to sea. Thirty-two or thirty-three of the slaves on board were taken on board in Hampton Roads from Norfolk, the brig lying at anchor at the time. When the negroes came on board no examination was made to see if they had any arms in their packs; never examined the packs of negroes, nor has ever known it to be done to

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see if they had any arms in their packs; saw no pistols on the voyage until the affray; if any pistols or weapon of any kind had been seen in possession of the negroes, they would not have been permitted to retain them. The brig was seaworthy in every respect when she left the port. When the Attorney General addressed the slaves as above stated, he appeared to be the chief commander of the whole concern, acting as next to the Governor. The Attorney General and one magistrate together put the 19 under the charge of the military, on the Friday when the slaves were liberated. They advertised in the papers a vessel for Jamaica for *emigrant passengers*; and applied to no other class of persons. Defendant is now mate of the Creole. The log-book was kept by deponent up to the liberation of the slaves at Nassau, and, from that time till our arrival at New Orleans, by Mr. Stevens. When deponent joined the vessel, the cargo was on board; and he asked the Captain how many slaves he expected to have on board; he replied, from 150 to 200. Deponent made the entry of 150 on the log-book, and let it remain so. In clearing the vessel at Nassau, the oath above alluded to was made before the collector of that port. Before the Attorney General made his address to the negroes at the time of their liberation, he called up all the negroes to listen to what he had to say. They thought they had all the slaves up. The five spoken of they could not see; two were in the cabin with the little boy, and the other two were in the hold. Deponent did not see himself these five, and thought they were all up with the others, except those in the cabin. All the negroes who sailed from Richmond and Norfolk were carried to Nassau, except those killed in the affray, who were thrown overboard. Saw none of the three negroes he speaks of above as being killed, but others told him they were killed; and on our arrival at Nassau, when the names of all the negroes were registered, there were three of them missing; whether they died in the fight he only knows from hearsay, but does not know that three were missing when the slaves were registered at Nassau.

On his cross examination, *Gifford* stated that he did not hear the names of any of the magistrates. The one who assisted the negroes over the gangway was a large portly man with black whiskers, a full blooded toping Englishman, dressed in light clothes. Knows that the nineteen who were arrested and put in prison at Nassau, were engaged after the insurrection in controlling and managing every thing on board. Deponent is not aware that any other negroes were brought out in the Creole, but those mentioned in the different bills of lading; was only mate of the vessel, and in that capacity had an opportunity of knowing. When the vessel got to sea, was told

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that there were 135 slaves on board, all told, and he believes this to have been the true number. Witness thinks about two-thirds, or nearly so, were males. Witness never applied after the insurrection to the rest of the slaves to assist the officers against the nineteen; his reason was, that four of these nineteen slaves were always stationed on the quarter deck of the brig, armed with knives and a pistol, and one forward in the gangway with a musket and bayonet. They thus guarded witness on the quarter deck, and kept him there so that he had no opportunity of communicating with the others. The guard was kept by the nineteen in turn, they relieving each other; neither witness, nor any one in existence, could have got back possession of the vessel after the nineteen had possession; nor could it have been done by stratagem, for no communication was allowed. The negroes had made up their minds, as witness understood, to kill all the whites as soon as they made land, and, of course, he would have done all he could to save his life, if he had any chance. They even took away his penknife. No combination was entered into between the witness and the white seamen, because they could not do any thing, being without arms of any kind, and no more than one seaman at a time was ever allowed to come on the quarter deck to take the wheel. Witness states it to be his belief, that under the circumstances in which they were placed, it was utterly impossible for him and the white seamen who remained on board, to regain the control or possession of the vessel; that there was no one moment, between the insurrection of the negroes and the time they reached Nassau, when they could, by any possibility, have regained control of the vessel from the nineteen. On the night of the insurrection the vessel had been hove to, and she remained so all night, even after the negroes had obtained control of her; but the next morning they put her head to the south, south-west; this was the same direction which was necessary to be pursued, whether they were bound to Nassau or New Orleans, as they had to make Abaco first. During this time it was the witness who gave the orders for steering. The true direction from the point where the insurrection occurred to Nassau, was S. S. W., and as they had commenced running on that course and were bound for Nassau, it was not subsequently changed. If the vessel had been under witness control in the prosecution of her voyage to New Orleans, they would have abandoned the S. S. W. course at the Hole-in-the-Wall, and then would have steered a course about W. by N. for Stirrup Key. From the moment of passing the Hole-in-the-Wall, the vessel continued in a S. S. W. course for Nassau. This course was pursued because D. Ruffin and George Portlock, who both un-

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derstood the compass, relieved each other in watching the compass, each in turn lying down armed, close by the binnacle, where they could see the compass, and threatening instant death if the course was changed. The officers and crew of the Creole, from the moment that the insurrection occurred, were in a situation in which they could do nothing under Heaven, by which they could have brought the vessel to New Orleans. Witness not only abandoned all hope of ever getting to New Orleans from the moment the insurrection occurred, but had abandoned all hope of ever setting his foot on shore, as the negroes declared that as soon as they got near the land, they would kill all the whites on board, but the Frenchman, and run the vessel ashore themselves. Witness being asked whether the negroes on board would have been compelled to go ashore, if they had desired to remain on the vessel, answers, that he supposes they went ashore through fear; that the magistrate said to them, "now get over the side of the vessel," and they got into the boats. Witness' impression was, that if the negroes in the vessel had not got into the boats, the negroes in the boats would have come on board and taken possession of the vessel. Witness being asked whether, in his opinion, if these nineteen men, who had control of the vessel, could have been got rid of by some chance or accident, the officers and crew of the brig could have regained control of her, and brought her to New Orleans, answers—that he does not know; that this idea never entered into his mind; that he would not have known whom to trust, not knowing whether these nineteen had been appointed by the others as chiefs, or whether they had assumed the command themselves. Never explained to any body in the island that he was going to bring away the five slaves that remained on board, except to the Consul. Never saw any of the Creole negroes after their examination in the boats that came around the Creole; supposes that they were deterred from coming by the negroes on shore. Deponent pointed out of those, the nineteen that he has mentioned; Mr. Stevens pointed out some, Merritt, McCargo also, and some of the crew. Part of them were pointed out as being engaged in the affray, and a part from their conduct subsequent to the affray, and their taking part in the management of the vessel the next day. The rest were not kept under any restraint by the nineteen after the affray, only they were not allowed to come aft, except to pump out the vessel; could not tell what their opinion was; had no conversation with them, but saw nothing in their deportment that would induce him to believe they would assist him in re-taking the vessel. Believes it was Elijah Morris who fired the first pistol; does not know who fired the second pistol. Saw the Attorney

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General give the signal for the musquito fleet to approach. It may have been given by some of the magistrates, but did not see it.

Gifford, being recalled by plaintiff, states that from any thing he saw he could not tell whether if the nineteen had been got out of the way after the affray, they could have brought the vessel to New Orleans. Saw nothing and noticed nothing that showed that the others would not be submissive inasmuch as he was guarded himself, and had as much as he could do to notice those who guarded him. Saw nothing to induce him to believe that the others were engaged with the nineteen in the riot.

Cross examined: says that he saw nothing in the conduct of the other negroes that could induce him to believe that they would join him in bringing the vessel to New Orleans, being so much engrossed by his own situation and the guards around him, that he noticed nothing else. The moment the negroes left the vessel, the Attorney General, with one of the magistrates, was in the Attorney General's boat, lying a short distance from the brig. Previous to his going into the boat, he had made a signal by beckoning his hand for the boat to approach.

The evidence introduced in this case is too voluminous to be embodied in the report. The witnesses for the plaintiff corroborated, in *thema in*, the evidence of *Gifford*. As to the address of the British Attorney General, the testimony is contradictory. *Leidner*, a Prussian by birth, a passenger on the *Creole*, introduced by the plaintiff, deposed: "That he heard one of the English officers, he believes it was the English Consul, say to the slaves on the *Creole*: 'Friends, come all on deck,' and they all came on deck, and looked at him, and he then said to them, 'You are all free, and you may go where you please now, and if you want to go ashore, there are the boats.' At the same he said, 'Come alongside with your boats;' and he was then speaking to the negroes in the boats around the *Creole*."

Merritt, a witness for the plaintiff, who had charge of the negroes on the *Creole*, testified that when the taking of the depositions was concluded, "the Attorney General ordered all who had been identified as taking part in the mutiny, to come on the poop. The soldiers took them by the shoulders and led them to the poop. The soldiers then removed from their former station, and came to the poop, and formed in a line on the poop. The Attorney General then addressed the negroes who were innocent, and said to them: "My friends, we have detained you here for

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a short time, on purpose of finding out who was engaged in the mutiny and murder on board of the Creole. There have been 19 identified as taking the most active part, which we shall detain until we get further orders from Her Majesty's government. The rest of you are free, and at liberty to go on shore, and wherever you please." He then addressed the mutineers: "Men, there are 19 of you, which have been identified being engaged in the mutiny and murder of Mr. John Hewell, and attempted to murder the Captain and others on board, for which we shall confine you in prison, in order to have time to communicate to the British government, to ascertain whether you will be tried here or elsewhere." One of the magistrates then made a signal for the boats to come alongside, beckoning with his hand. This magistrate was Burnside, who took the most active part in taking the depositions. On this signal being given, the boats came alongside as quickly as they could get their anchors up, &c. When they got alongside, they wanted to come on board, and the magistrate, Burnside, told the negroes not to come on board, but to take the negroes quietly down from the Creole, and assist them on shore. The Attorney General then, accompanied by one of the magistrates, got into his boat, and left the Creole's side; they rowed off a short distance from the vessel, and laid on their oars. The negroes in the boats from the shore then called to the slaves on board of the Creole, to come to them, and they assisted them down in the boats. Some of the women slaves were conducted to the steps of the gangway of the Creole by one of the magistrates, and assisted over the side by him into the boat. The magistrate was Burnside.

"After the Attorney General had finished, deponent was standing by his side, and requested him to state to the negroes that all who thought proper to proceed on the voyage could do so. The Attorney General would not do so, and stated, in effect, that he would not make any such remark. Then deponent said: 'Men and women, all of you who think proper to proceed on the voyage to New Orleans, have the privilege of doing so on board of the Creole.' They said nothing to this, as he heard. He supposed they paid some attention to him.

"Witness said nothing to the negroes similar in import to what was said by the Attorney General. The Attorney General said that they might go on shore, and witness said that they might go on board. The Attorney General did not say to the negroes, 'that they were no longer under the restraint of the military guard, or any such words at all.' If he had said these words, witness would have heard him, for witness was standing as close to him as he could, without touching him. It is not true, 'that the slaves left the brig in consequence of what wit-

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ness told them ;' but five staid in consequence of what witness told them. It is not true that witness stated to the slaves, 'that they were perfectly at liberty to go on shore.' "

This witness denied that he told the slaves "that it was not the wish of any person to detain them on board against their wills," or "that if they wished to leave the vessel they could do so ;" or that he asked "the officer in command whether he had any orders to withdraw the guard, and requested him to notify them of his intention, if such should be the case, as they were afraid to remain with the people, without protection."

Stevens, the second mate of the *Creole*, confirmed generally the testimony of Gifford. He testified that "he did not remember exactly the words the Attorney General made use of to the slaves ; but the amount of it was, that those who were not engaged in the murder were free, and might go where they pleased. That, at a signal given by one of the British officers on board, the negroes came rushing up in their boats with a loud noise ; and that one of the magistrates stood in the gang-way, and helped the slaves over the sides."

Curtis, a seaman on the *Creole*, deposed, on behalf of the plaintiff, that "when the Attorney General finished, he said to the negroes, that they were free, and the negroes then made a break over the side of the boat. That the magistrates were present, and aiding in getting the negroes into the boats."

Foxwell, another seaman, testified, "that the negroes were sent on shore by a man who seemed to be a British officer. He told them that they could go ashore ; that they were all free. He said this loud enough for the negroes in the boats to hear him. The negroes lay all around the vessel in their boats, saying to the officer on board to bear a hand and get through, that they wanted to come on board. They obeyed the officers. The negroes on board the brig rushed out of the brig into the boats. The moment that the boats got alongside, one or two of the British officers stood at the gang-way, and helped two or three of the negroes to get into the boats."

Theophilus J. D. McCargo, a passenger on the *Creole*, introduced by the plaintiff, testified, "that the Attorney General stood on the quarter deck, and called the slaves who had not been concerned in the mutiny up to him. They stood on the main deck, and he said, 'My friends, you have been detained a short time on board of the vessel to find out those engaged in the murder of Mr. Hewell, and attempting to kill the Captain and others, and that nineteen had been identified, and that all the rest of you are free and at liberty to go on shore, and where you

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please.' He spoke to the mutineers, and said that they would have to remain in prison till they could communicate with the English government, to know if they were to be tried there or elsewhere. Deponent then saw one of the magistrates beckoning with his hand to the boats, to come alongside. Deponent heard Mr. Gifford say to the Attorney General, that he protested against the boats coming alongside, or the negroes going on shore. The boats immediately came alongside of the vessel. The magistrates told the people in the boats not to come on board, but ordered the slaves to pass out of the brig into the boats, and assisted some of them over the side. They all left the vessel but five, who secreted themselves in the hold and cabin. The Attorney General left the vessel in his boat, and lay a little way off, looking on."

John F. Bacon, on behalf of the plaintiff, testified that the brig *Creole* arrived at Nassau early in the morning of the ninth of November, 1841. That he visited said vessel during the morning of the ninth of November, 1841, at the request of Gifford, mate of said vessel, which was after he had had an interview with the Governor, with the mate; and he visited the vessel in the capacity of American Consul. On first visiting said vessel, on the morning of ninth of November, 1841, I found two or three white citizens, several Custom-House officers, a colored pilot and his colored crew on board, a large number of the male and female slaves on the forward deck of the vessel apparently in a very quiet state; Mr. Gifford having been previously requested by me to go on board and take charge of the vessel, and keep the American colors set, I found him in charge; and Dr. Chipman, the surgeon dressing the wounds of the Captain, (he having been previously requested by me to go on board). After the wounds of the Captain had been dressed, and after the arrival of a guard of colored troops, consisting (as I believe) of twenty colored privates, sergeant and corporal, under command of Lieutenant Mends, a white officer, and after having introduced to Lieutenant Mends, immediately on his coming on board, Mr. Gifford, as the officer then in command of the vessel, and who was to be obeyed as such, and after having been informed by Lieutenant Mends, on my making the enquiry of him, that his orders were to permit no colored passengers (as he called the slaves) to leave the vessel, and no colored persons to come on board, except by authority from the Governor or American Consul, and that no white persons would be prohibited from going on shore, nor any persons that I might wish to send on board, I returned with the Captain in my boat, with two of the wounded sailors. I had my carriage on shore, in which, with difficulty, Captain Ensor was placed, and conveyed him to lodgings.

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Immediately on the mate's informing me of the situation of the vessel, I repaired with him to the government house and obtained an interview with the Governor, Sir Francis Cockburn, and stated to him the circumstances, and requested him to take measures to prevent the slaves from coming or escaping on shore, and that an investigation might also be made so as to identify the murderers and have them secured. The Governor said he did not think he was authorized to interfere with the slaves in any manner, but he felt inclined under the circumstances to comply with my request, so far as to identifying and securing the murderers, but that, as to the rest of the slaves, they must be considered and treated as passengers. While in conversation with the Governor, a report was made to him by the harbor-master, that the brig *Creole* had arrived with one hundred and thirty-five *passengers*; the Governor called my attention to it, from the fact that they were styled *passengers* in the report. The Governor then took down a statement from the mate in writing for the purpose, as I understood, of consulting with the Attorney General, for whom he despatched a messenger while I was present; he also requested me to make my application in writing, promising to inform me of the result of his determination as soon as he had consulted with the Attorney General. We then left the government house, and I despatched a note simply requesting him not to suffer the slaves on board to land, until a further investigation was made. I did not enlarge this request at this time, for fear of jeopardizing his compliance, for I well knew, both from the conversation I had with the Governor at this time, and from the opinions of many of the officers of the government, and also of private individuals, which I had frequently heard expressed, that it would be deemed a violation of the laws of Great Britain, in any manner to molest or prevent slaves from obtaining their freedom, if once within the jurisdiction of the Colony, no matter in what manner they might arrive or be brought within their jurisdiction, and therefore that a request in writing to forward the vessel on her destination with the residue of the slaves on board, would have been deemed inadmissible. A copy of the said note or communication is hereto annexed, marked A.* After writing said note, calling at the house of the surgeon with a request for him to go on board, and also making preparations to receive the captain and wounded men on shore, I proceeded to go on board, and on my way, received a note from the Colonial Secretary, informing me

* The different documents referred to by the witness, will be found in a note at the end of his evidence.

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that the Governor had instructed him to say that he had ordered a military party on board the brig, a copy of which note is annexed, marked B. I then repaired on board, Captain Woodside accompanying me at my request. Soon after my return from the vessel, I received a verbal message from the Governor, requesting me to attend the Governor and Council, then in session, on the subject of the slaves. On my attending, the Governor said he had sent for me to inform me of the course that himself and Council had determined to pursue, and which he proceeded to read to me from a paper before him, and hoped I would be satisfied with it, to which I replied that I was satisfied with the troops being sent on board and an investigation being directed, but declined a further acquiescence at that time. I also desired a copy of their deliberations, which was furnished me in the course of the day, which is hereto annexed, marked C. I soon after repaired on board in company with Robert Duncome, and J. J. Burnside, a Justice of the Peace. Robert Duncome was Police Magistrate, and commenced the examination of the officers and men, which was continued that day until near night. The examination was continued the next day by the said Robert Duncome and Lieutenant Elwyn, a Justice of the Peace. Burnside did not attend on that day. The examination continued all day, and was postponed until Friday morning, the 12th November, 1841, in consequence of the illness of the captain and one of the men, it being deemed proper by the magistrates that at this stage of the examination, the captain should be next examined. On Friday morning, about nine o'clock, Mr. Duncome called at my office at the American Consulate, and informed me that he was soon going on board for the purpose of having the persons implicated identified, by having them brought before the witnesses for that purpose, and then having them and the troops brought ashore. I replied to Mr. Duncome: "How is this, you know well that we were, by agreement, to go on to-day with the examination of the captain and the man on shore;" and I then mentioned the fact to Mr. Duncome, or had done it the day previous, that the captain knew which slave had murdered Mr. Hewell, and I considered him a very important witness. Mr. Duncome then remarked, "it was by authority"; and I said, "of the Governor?" to which he nodded assent, and immediately rode away. This conversation took place while he was on horseback. The object of Mr. Duncome in giving me the above notice was, as he said, that I might accompany him on board; and he mentioned the time when they would leave, which I think was ten o'clock. Soon after this, in proceeding down the principal street on my way to my dwelling house, and towards the place where the

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vessel lay, I was enquired of by a respectable white inhabitant, if I knew "that the slaves on board the Creole were to be rescued and brought on shore by the blacks of the island to-day?" This being the first intimation I had of any such design, I answered, "No." He assured me that it was a fact. From thence I proceeded to the Vendue House, a sort of Exchange for the town, where I saw two respectable white inhabitants of the town, who appeared much interested in looking towards the direction of the vessel, on which I enquired, "what was going on?" One of the gentlemen remarked: "Do you see that launch"—pointing towards the vessel and to a launch apparently about half way between us and the vessel. I replied that "I did." I cannot now distinctly recollect the exact words that passed between us, but it was in substance, that *that* launch belonged to one of the parties present, and that the slaves were to be liberated by the blacks by means of boats. I then proceeded on my way to breakfast; after which I repaired to the Police Office for the purpose of going on board with the magistrates, to identify the criminals; and on going towards the boat to embark for that purpose, I was also informed by several persons that an attempt was to be made to liberate the slaves by force. I also received a note from a respectable white person, stating that the black servants in the service of said person had gone to assist in liberating the slaves on board the Creole, and that the arrangement had been made with said servants during the night previous for that purpose. I also noticed in going down to the boat, a number of females as well as males, on the front upper piazzas, with spy glasses directed towards the brig. On arriving at the boat, and when I was about embarking, I was informed that an attempt had already been made to board the vessel by black persons in boats around her. I also saw quite a number of boats near and about the vessel. Mr. John Pinder who was present, and about entering the boat, heard this remark, and was also informed that there was a large collection of persons on the shore opposite where the vessel lay, on which he remarked: "I will not go on board, but will walk down that way,"—meaning towards where the persons had collected. I also decided not to go on board, but to return immediately, and communicate to the Governor, the fact of the mob on shore, and the attempt to board the vessel. I returned immediately to my office where I found Mr. Gifford waiting for me, who informed me of there being a large collection of boats around the brig, filled with blacks, armed with clubs, and using threatening language and gestures, and that the crew were greatly intimidated, and he wished to know what I intended to do. I informed him, I had then come to the office for the pur-

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pose of communicating the facts to the Governor, and soliciting his interference to protect the vessel and slaves. I then immediately despatched a note to the Governor, a copy of which is hereto annexed, marked D. I also informed Mr. Gifford, that in consequence of the unwarrantable breaking off of the investigation, the arrangement in reference to putting men on board had not been completed because I supposed, the examination would have occupied two days longer, but I would still endeavor to get some men on board, and desired him to return with his boat's crew immediately, and I would inform him of the result of the application to the Governor for the protection of the vessel and slaves. I immediately sent for Mr. Creasy, the mate of the brig Congress, and then in command of said brig, the captain having gone to the United States, and requested him to go on board the brig Creole with four of his best men, and report that they were sent by the American Consul. He accordingly proceeded towards the brig Creole with four sailors, whom I saw embark from the Congress, taking with them several muskets, she laying but a short distance from my office. I saw her on the way to the Creole, until my view was interrupted by intervening vessels; after some time he returned and reported to me that on going alongside he was refused admission on board by one of the magistrates, Mr. Burnside, on which he informed the magistrate that he was from the American Consul, and that they also threatened to fire into his boat if he attempted to come on board. The boat used on this occasion belonged to the barque Louisa, the boat of the brig Congress having been washed away from the davits, by the gale which compelled her to put into Nassau in distress. The people continued collecting on shore, and the excitement increasing, when I received an answer to my note to the Governor, a copy of which is hereto annexed, marked E. At the same time I was informed by the messenger from the Governor, that the Council was then in session, and that they would soon wish to see me. In about a half an hour a messenger requested my attendance before the Governor and Council. I accordingly attended.

On attending, the Governor informed me, that on receiving my note he had convened the Council. (In relating the conversation that took place between the Governor and myself, I may not give the precise language used, but the substance, except in reference to his directions to the Attorney General, which is given in his precise words.) That I was, no doubt, aware there was much excitement about the brig Creole and the people on board, and also that many exaggerated accounts were in circulation, that there was a large collection of colored people, but that he did not think that they had or would commit any acts of

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violence, such as I had charged them with or seemed to anticipate. I replied, that at all events, the officers and crew of the brig were very much alarmed for their own safety and that of the slaves on board, and, I thought, not without just reason. He then introduced the subject of the slaves being *passengers*, and contended strenuously that he so considered them, and the Council agreed with him that they must be treated as passengers; while I contended that they were slaves, and, under the circumstances, as much a portion of the cargo as the tobacco on board, and, as proof that my position was correct, referred him to the manifest of the slaves, which I had in my possession. He further stated, that he had just been informed that I had attempted to send on board the brig a large amount of arms and ammunition, with some men. On which, I stated to him the facts, as above detailed, and, also, that they had been refused admission on board; I also stated, that I much regretted that the examination of witnesses could not have proceeded further, as Captain Ensor could identify the person who murdered Mr. Hewell, and could also identify more who were engaged in the affray than any other individual; on which the Governor made a suggestion, that the people on board might be made to pass before the Captain at his lodging, but he immediately corrected himself, and said that would not do, for the moment they placed their feet on shore, he would have no more right to molest or control them than other person: he further said, the Council had decided to send the Attorney General on board the brig, with such persons as he might select, and suggested that the Provost Marshal should be one, for the purpose of preventing any violence being committed by the persons around the vessel, to have those implicated in the murder, and troops removed on shore, and then to see that no obstruction was given to the passengers (as he designated the slaves) landing; and, immediately thereon, repeated these directions to the Attorney General, and requested him to proceed immediately on board. I left without making any remark by which my acquiescence could be in any way inferred and found Mr. Gifford and Capt. Woodside waiting at the Custom-House dock, immediately opposite to the Council room, and informed them of the determination of the Council, stating, that I did not see that any thing more could be done on our part to prevent the liberation of the slaves, as their liberation, I was satisfied, had been determined on since their first arrival in port; but I desired Mr. Gifford immediately to repair on board the brig and protest against every act of the Attorney General and those with him, that would have a tendency to deprive him of the control of the slaves. I also requested Captain Woodside to accompany him, and they left in their boat

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about the same time that the Attorney General and his party did. In about an hour after their departure, I saw a large concourse of people, principally blacks, who collected around the public buildings, but a short distance from my office; on which, I went to where they were collected, and saw the slaves from the Creole with others going into the office of John Pinder, Esq., Inspector-General of the Police, and I attempted also to get admittance, but was prevented by the crowd, which numbered between one and two thousand, considerably over one thousand, and, as Mr. Pinder has since informed me, on that occasion he took a register of their names together with their occupations. I then proceeded towards my dwelling house, in company with Mr. Hamilton, the Pilot of the Port, who said to me, in reply to a remark of mine, it was in vain to expect that those people (meaning the slaves) would be permitted to leave the harbor without their consent; that he had orders from the Governor not to take out the brig while they were on board. After the slaves were thus landed, I also saw the troops, and the slaves retained in custody, coming from the brig to the shore, I should think nearly an hour after the landing of the slaves. During the evening Mr. Gifford and Captain Woodside reported to me the manner in which the slaves had been liberated. And on Saturday, the 13th November, I proceeded to take the examination of Captain Woodside, and the officers of the brig and of Mr. Merritt. And, early on Monday morning, the 15th November, I despatched a protest against the proceedings of Her Majesty's officers, in liberating the slaves on board, and, also, requested that the nineteen slaves in custody might be forwarded to the United States, in the brig Creole, (a copy of which communication is annexed, marked F,) which request was refused by the Governor, who, in communicating his refusal, also enclosed me the report of the Attorney General, containing his statement of the transactions, on board of the brig (See document G). During Monday, Captain Ensor sent me a letter, which he had received from Thomas M. Mathews, Esq., Attorney at Law, demanding the immediate delivery of the baggage of fifty-four slaves of the Creole, and threatening proceedings at law unless the demand was immediately complied with. On consulting with Mr. Gifford and ascertaining that the baggage consisted principally of some old blankets and some old clothes, the slaves having taken on shore their principal and best clothing when they left the vessel, as he informed me, and rather than contest fifty-four suits, and having ascertained that the retaining fee in each suit would be three guineas, and that the court of inferior jurisdiction, in which the suits would be commenced, was a court of final jurisdiction, from which no appeal would

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lie, and that the juries, as far as I had observed, were mostly composed of colored people, never having seen more than two white persons on a jury at a time, I advised Mr. Gifford to give up the articles of clothing left by the slaves on a baggage pass being produced from the Custom-House, and thereupon prepared an answer to Mr. Mathews' letter, which I signed and forwarded. I subsequently saw in the hands of the searcher, so called, (being a Custom-House officer) a regular baggage permit to receive the baggage of the *passengers*, and have it landed. I attempted, with Mr. Gifford, to come to an entry in the Custom-House of the vessel and cargo that remained on board, for the purpose of disposing of some of the surplus provisions on board, which had been provided for the slaves; when such entry was refused by the Custom-House officers, unless the slaves still on board were entered as *passengers*, which entry being refused, no entry was made. On the 17th day of November, the officers of the brig, together with one seaman, Blinn Curtis, executed their protest before me, as American Consul; and, on the same day, I shipped a second mate and two men, and on the 18th the brig proceeded on her voyage to New Orleans, the captain having been left on shore with one of the men, they being too ill to proceed, and one of the wounded men being put on board, though too ill to do duty.

Mr. Dillet, the aid-de-camp of the Governor, was the only man on horseback whom I saw take any part in directing the movements of the mob on shore, and communicating with those around the vessel. And when waiting for orders or to receive reports, he reined his horse in front of the wing of the public building in which the Governor and Council held their session and while in session, and was active throughout the whole day, to wit, Friday, the 12th day of November, 1841. No attempt was made to disperse this collection of people, but, on the contrary, every facility was afforded them, by furnishing them with boats, and publicly commending their proceedings, both before and after the liberation of the slaves. For these reasons, and facts before detailed, particularly the breaking off the examination of witnesses so abruptly, and in my view so improperly, I have not the least doubt on my mind that the collection of people on this occasion was with the knowledge of persons in authority, and was for the purpose of taking off the slaves, as soon as the troops should be removed, and that but for my officially communicating the knowledge of the collection of a mob to the Governor, they would have been permitted to do so. The troops, it is true, were put on board at my request, but with the express understanding that they would be removed on the termination of the investigation; but they were not removed

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until after the slaves had been liberated. Thus, the vessel, after having been occupied by the troops, was not left by them in possession of the officers and crew, so that they could exercise any control over the slaves. I was not permitted to put on board sailors, even to make good the place of those disabled. I am confident, if the investigation had continued one day longer, and I had been permitted, a sufficient force would have been put on board perfectly to manage the slaves that would have remained after the implicated ones should have gone on shore; and, consequently, that the interference of the authorities at Nassau was the sole and only cause of their liberation, no volition on the subject being permitted to the officers and crew of the brig. Immediately on the landing of the slaves I was informed that a schooner, called the Francis Cockburn, and owned by John Pinder, Esq., was to sail in a few days for Jamaica, with *emigrants*, as they are called. That on the 18th of November, she sailed for Jamaica, with some fifty or sixty colored people, between forty and fifty of whom were slaves from the Creole. This fact I state from my own knowledge. There was a vessel sailed shortly after with some of the slaves from the Creole, for the same destination.

After I had become satisfied that no assistance would be afforded me to get the vessel to her destination with the slaves on board, I consulted with Captain Woodside as to the best mode to protect the property of the owners of the slaves and vessel. While the troops were on board, I did not feel authorized to advise an abandonment of the vessel, and considered that an important point had been gained in arresting the mutiny before its consummation, by the intervention of the British authorities; and, also, an acknowledgment by them of the national character of the vessel, by permitting an investigation by British magistrates, and also permitting British troops to perform duty under the American flag. I enquired of Captain Woodside if he were willing, provided some eight or ten men were added to the crew of the brig Creole, to go on board and assist in navigating her on the voyage, as far as Stirrup Key, or further, if it should be deemed necessary; in which case, I was to provide a passage for him and such of his crew as should accompany him, back from the Key. He readily assented to this arrangement, particularly as the removal of those engaged in the murder would probably leave but few, if any, who had been active in the mutiny, as there were also some sixty women and children. There being but a single musket on board the Creole, it was thought best to procure more muskets and a couple of brace of pistols, sufficient to keep the slaves on board from leaving the vessel, after the troops should be removed; which, I supposed, agreea-

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bly to the arrangement to that effect, would have been done as soon as the examination terminated. After this, I consulted with Captain Ensor in reference to this arrangement; and he approved of it. Mr. Gifford also assented to it, and expressed his willingness to go in the vessel, in command of her, under this arrangement. It was also arranged with Captain Woodside, that he should take four of his crew; and I also made an arrangement with Mr. Creasy, mate of the brig Congress, and then in command of her, for four of his men to go on board, and he also volunteered to go himself, if it was deemed necessary. This arrangement was made during Wednesday and Thursday, the 10th and 11th days of November. On Thursday afternoon, in company with Mr. Gifford and Mr. Merritt, we called at three places where such articles were kept for sale—two by colored people, and one by a white man—and enquired for muskets and pistols, but could not obtain any. Some ammunition was provided and put on board. This arrangement was prevented from being effected in consequence of the suddenly suspending the examination, and other facts on that subject, hereinbefore particularly detailed.

I have omitted to state two circumstances that may have a tendency to aid the plaintiff. Early on Saturday morning, the 13th November, 1841, on going to my office I met John Pinder, Esq., who made the following remark to me: "I think it was well we went on board yesterday; if we had not, I have no doubt, blood would have been spilled." On the morning of the 12th of November, 1841, I saw the harbor-master, Mr. Tulford, whose duty it is to see that vessels are properly moored in the harbor, (he having just returned to Nassau,) and stated to him that, in my judgment, the Creole was not anchored in a proper place, that in case of a north-west wind she would be in great danger of being driven on the rocks. He replied, "It was so;" and, on my request, promised immediately to have her warped further up the harbor, to a better situation. This not being done agreeably to his promise, I subsequently inquired of him, why he had not performed his promise. He replied, that it would have been worth his life or his commission, (I cannot be positive which), but, on Saturday, the 13th November, 1841, he did it.

Being asked, on his cross-examination, whether the first interference, if any, on the part of the British authorities, was not solicited by yourself? Whether they did not refrain from taking any steps in the matter, till you, yourself requested that a guard should be sent on board? He answered: Yes; after the vessel arrived in port; but she was boarded outside of the harbor by a black pilot and his black crew, and brought into the harbor by him and his crew. I first communicated the situation of the

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vessel to the Governor, who then ordered a guard on board, as stated in my answers to the direct interrogatories. Being asked whether if no military guard had been sent on board, would not the slaves have gone ashore without the possibility of preventing it by those on board, witness stated that he could not answer this interrogatory any further than to say, that if the military guard had not been placed on board, an attempt would have been made to prevent their landing. Being asked, were you not informed by the authorities of the island, that they would aid in arresting those guilty of the murder and mutiny, but would not interfere to prevent the others from going ashore? Witness answered: I was informed by the authorities that they would aid in arresting those guilty of murder, and prevent any from going on shore until the examinations should be completed, after which those who remained were to be released from restraint by the authorities. Being asked, in whose possession, and under whose control did the Creole arrive in the harbor of Nassau? Was she in possession of the whites or of the negroes? If of the latter, had they not to all intents and purposes gained their freedom before reaching Nassau? If Nassau had been on an uninhabited isle, would they have been, in point of fact, free or slaves, on reaching that harbor? Witness answered: In the possession and under the control of the pilot, but I have no doubt she was brought to Nassau till the pilot boarded her by the directions of the mutineers. I do not think that they had gained their freedom, nor could they even, according to the English interpretation of English law, have gained their freedom before landing on the island. As the latter part of this interrogatory is evidently framed for the purpose of eliciting an opinion only, I decline answering it.*

* *Documents referred to by the witness, Bacon:*

A.

CONSULATE OF THE UNITED STATES OF AMERICA,
NASSAU, Bahamas, November 9, 1841.

SIR: Having had detailed to your excellency the particulars of the mutiny and murder on board the American brig Creole by slaves on board said brig, I have now to request that your excellency will be pleased not to suffer any of the slaves on board to land *until further investigations can be made.*

I have the honor to be, Sir, very respectfully, your obedient servant,

JOHN F. BACON, *United States Consul.*

His Excellency Colonel Sir FRANCIS COCKBURN,
Knight, Commander-in-Chief, &c. &c.

B.

NASSAU, November 9, 1841.

SIR: The Governor has instructed me to acknowledge the receipt of your letter of this date, relative to alleged mutiny and murders on board of the Ameri-

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Ensor, the captain of the Creole, was examined on behalf of the plaintiff, but having been disabled by his wounds, and con-

can brig Creole, and to acquaint you that, *for the fulfilment of the object of your letter*, his excellency has ordered a military party on board of the said brig. There will be, however, no impediment to any of the white persons on board landing here.

I have the honor to be, Sir, your most obedient servant,

C. R. NESBITT, *Colonial Secretary.*

JOHN F. BACON, Esq.,

Consul for the United States of North America.

C.

NASSAU, November 9, 1841.

SIR: In compliance with your request, I have the honor to forward to you, by direction of the Governor, a copy of the statement communicated personally to you this morning by the Governor and Council, in reference to the case of the American brig Creole, on board of which vessel a murder and certain other offences are alleged to have been committed.

I have the honor to be, Sir, your most obedient servant,

C. R. NESBITT, *Colonial Secretary.*

JOHN F. BACON, Esq.,

Consul for the United States of North America.

COUNCIL CHAMBERS,

Bahamas, November 9, 1841.

We wish to state to you, as the representative of the American government, that the circumstances detailed to the Governor this morning in your presence, respecting the events which took place on board of the American brig Creole on the night and subsequently to the 7th of November, have been given all possible consideration to by the Governor and Council, by whom the following decisions have been come to:

1st. That the courts of law here have no jurisdiction over the alleged offences.

2d. But that as an information had been lodged before his excellency the Governor, charging the crime of murder to have been committed on board of the said vessel while on the high seas, it was expedient that the parties implicated in so grave a charge should not be allowed to go at large, and that an investigation ought therefore to be made into the charges, and examinations taken on oath, when, if it should appear that the original information was correct, and that a murder had actually been committed, that all the parties implicated in such crime, or in any other acts of violence, should be detained here until reference could be made to the Secretary of State, to ascertain whether the parties detained should be delivered over to the American government or not, and, if not, how otherwise to be disposed of.

3d. That so soon as such examinations should be taken, all the persons on board of the Creole, *not implicated in any of the offences alleged to have been committed on board of that vessel, must be released from further restraint.*

4th. That a detailed account of what has taken place should be transmitted to the British Minister at Washington.

A true copy:

C. R. NESBITT, *Colonial Secretary.*

JOHN F. BACON, Esq.,

Consul for the United States of North America.

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fined to his bed during the whole time that the Creole was at Nassau, his evidence is unimportant. He stated that the tonnage of the Creole was 157 tons and 25-95ths of a ton.

D.

CONSULATE OF THE UNITED STATES OF AMERICA,
NASSAU, *Bahamas*, November 12, 1841, 12 o'clock, A. M.

SIR : On proceeding to go on board the brig Creole, with the magistrates this morning, I saw a large collection of persons on the shore nearest the vessel, and many in boats; and was, at the same time, informed that the moment the troops should be withdrawn from the brig, an attempt would be made to board her by force. I was further informed an attempt had already been made. I have, therefore, to request your excellency will take such measures as you may deem proper for the protection of the said vessel and cargo.

The above facts I have every reason to believe correct; and did not accompany the magistrates, that I might communicate the same to your excellency.

I have the honor to be, Sir, very respectfully, your most obedient servant,

JOHN F. BACON,
United States Consul.

His Excellency, Colonel Sir FRANCIS COCKBURN,
Knight, Commander-in-Chief, &c. &c.

E.

GOVERNMENT HOUSE,
Bahamas, November 12, 1841.

SIR : In answer to your letter, this moment received, I beg to state, that I cannot think it possible that any of her Majesty's subjects would act so improperly as to attempt to board, by force, the American brig Creole; and should such an unauthorized attempt be made, I shall be quite ready to use every authorized means for preventing it.

I have the honor to be, Sir, your most obedient servant,

FRAN. COCKBURN.

JOHN F. BACON, Esq.,
United States Consul, &c. &c.

F.

CONSULATE OF THE UNITED STATES OF AMERICA,
NASSAU, *Bahamas*, Monday morning, November 14, 1841.

SIR : I have the honor to state to your excellency, that I was not, from various causes, enabled, until late on Saturday evening, to obtain a detailed statement, from those on board the brig Creole, of the proceedings of the Attorney General, and those accompanying him, by which all the slaves on board the said brig, with the exception of four, were put on shore and liberated. Against the manner of their liberation, and all the proceedings which ultimately effected it, on the part of Her Majesty's officers and subjects, I deem it my duty to enter my solemn protest; and, also, on behalf of the chief mate, now, and then in command of the said vessel, also to protest.

These slaves, as I view the case, while they were under the American flag, and regularly cleared from one slave-holding State to another, within the United States, were as much a portion of the cargo of the said brig, as the tobacco and other articles on board; and whether on the high seas, or in an English port, does nor change their character; and, that her Majesty's government had not the right to interfere with, or control the officers of an American vessel, thus cir-

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The plaintiffs offered in evidence a "Message from the President of the United States, communicating, in compliance with

circumstances, in such a course as might be necessary and proper to secure such property from being lost to the owners.

I beg leave further to state to your excellency, that I shall, in a few days, be able to forward the brig on her destination, and take the liberty of requesting your excellency to permit the sixteen slaves who have been identified as having been actually concerned in the murder and outrage on board of her, and now in confinement, as, also, the three who are in confinement for the same offence, not having yet been identified by the captain of the brig, but only named by him, on account of his extreme illness, to be forwarded to the United States by this same vessel, they to be secured as is usual in such cases. I am induced to make this request of your excellency, under the circumstances that I have not the power to detain them, nor can I persuade the witnesses to remain here until it is ascertained where the slaves are to be tried. If they are to be tried here, it would, therefore, be almost impossible to obtain the attendance of all the witnesses, without which the persons implicated could not all be convicted, though guilty. This difficulty, I apprehend, must exist to nearly the same extent, if the criminals are to be detained here for any length of time, and then sent to the United States to be tried there. This difficulty would be obviated if they could be forwarded, as I have requested. I feel some embarrassment in making this request after your excellency and council have given a decision on this point; that, however, was made before the examination by which the persons have been implicated, and before it could be viewed, by me, at least, in all its bearings.

I have the honor to be, Sir, very respectfully, your most obedient servant,
 JOHN F. BACON,
United States Consul.

His Excellency, Col. Sir FRANCIS COCKBURN,
Knight, Commander-in-Chief, &c. &c.

G.

NASSAU, November 15, 1841.

SIR: I have the honor to acknowledge the receipt of your letter of this date, and cannot withhold from you that I feel somewhat disappointed at its contents, as it has been the wish and object of myself and Council to meet your views and wishes, as far as we were authorized, in all that has taken place respecting the American brig Creole; and as our intentions were throughout made known to you previously to being acted upon, without calling forth any objections on your part, we could not but consider that you acquiesced in them.

As the statement contained in your letter respecting what occurred while the Attorney General was on board of the Creole, does not accord with the official report thereof made to me by that officer, I transmit a copy of the same for your information; and by which it distinctly appears, that neither he nor any of the authorities here had any thing to do, either with the negroes quitting the vessel, or their landing here.

With respect to your request, that the nineteen persons who appear to have been implicated in the murder and other violences committed on board the Creole, when at sea, should be delivered over to you for the purpose of being secured and sent to America for trial, I can only refer you to the document already furnished to you by my order in Council, and by which it was already determined that the parties referred to should be detained here until instructions should be received on the subject from Her Majesty's government; and, under your apparent acquies-

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a resolution of the Senate, copies of correspondence in relation to the mutiny on board the brig Creole, and the liberation of the

cence in which, and your agreeing to attend the investigation, the same was proceeded with.

I have the honor to be, Sir, your most obedient servant,

FRAN. COCKBURN, *Governor.*

NASSAU, November 13, 1841.

SIR: I have the honor to report to your excellency, that, in accordance with your wishes, I yesterday proceeded, in company with the police magistrate and the inspector general of police, for the purpose of visiting the American brig Creole, on nearing which vessel, I found in her immediate vicinity several boats filled with colored and black persons, belonging to this island; that presuming these to be the persons alluded to in the American Consul's communication to your excellency, of yesterday's date, I visited each of the boats, and addressing the persons in them, informed them of the report which had been made by the Consul, explained to them the liability which would attach to them if they acted in the way in which it was alleged they intended to act, and strenuously urged them to abstain even from using words or gestures which might be considered as having a tendency to violate the peace. In answer, they one and all assured me, that it was not their intention to resort to any acts of violence, and that they had merely assembled for the purpose of peaceably conveying to the shore such of the persons on board of the Creole as might be permitted to quit her, and should desire their assistance. The persons in these boats were without arms, or any offensive weapons, with the exception of some ten or a dozen stout cudgels, which I observed in one of the boats, and which at my request, the parties in possession of immediately threw overboard. Having thus endeavored to guard against a breach of the peace, on the part of the persons from the shore, I went on board of the Creole, and had there pointed out to me by the police magistrate, eighteen persons against whom informations had been lodged, charging them with being parties to the murder of a passenger, and the wounding of the master and the mate of the Creole; in addition to these, one other person was subsequently identified by two witnesses as being a party concerned, and placed by the magistrates with the eighteen before-mentioned. This having been done, I enquired of the chief mate (the officer in charge of the vessel) whether he had any other witnesses to produce; to this he answered in the negative. I then requested Lieutenant Hill, the officer in command of the military guard, to take charge of the accused (nineteen in number), and I, at the same time, informed these persons that they would shortly be conveyed on shore, and there imprisoned, until a representation of their case should be made to the British government, by whom it would be decided whether they should be delivered up to the American government for trial, or how otherwise dealt with; that if they wished copies of the informations, they should be furnished with them, and they should also be at liberty, if they thought proper, to have witnesses examined in refutation of the charges made against them, with all of which they expressed themselves to be satisfied.

The accused having been thus separated from the other persons on board, I told the chief mate, that, as far as the authorities of the island were concerned, all restrictions upon the movements of the other persons on board the vessel were removed, and requested him to cause every person on board the vessel to appear on deck, in order that I might communicate the same to them; with this he cheerfully complied, informing me, at the same time, that it was not his desire

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slaves who were passengers on said vessel." Senate Document, No. 51, 2d Session of 27th Congress. The documents

to detain on board his vessel any one of the persons (shipped as slaves) who did not wish to remain, and that they had his free permission to quit her, if they thought proper to do so; but that he was apprehensive that the persons in the surrounding boats would, as soon as the military were withdrawn, board his vessel, and commit acts of robbery and other violence. To this I replied, that, with respect to the first point, I had no instructions to interfere between himself and the persons alluded to; and as to his fears of being attacked from the people in the boats, precautions had been already taken to guard against such an event, and that he might rely upon being protected by the authorities against any violation of the law. All the persons on board having by this time been assembled on deck, I briefly addressed them, telling them, that, on the arrival of the Creole in this harbor, information having been laid by the mate before your excellency, charging a murder, and certain attempts at murder, to have been committed on board of that vessel, and the protection of the authorities here having been claimed by the American consul, a guard of soldiers had been placed on board, for the purpose of preventing any person from quitting the vessel until an examination could take place, whereby the real perpetrators of the alleged acts of violence might be discovered; that such an examination had now concluded, and without any criminatory evidence having been adduced against any of the parties whom I was addressing; that such being the case, I had to inform them that, as far as the authorities of the island were concerned, all restrictions on their movements were removed. I had no sooner concluded, than a white man, who I was informed was a passenger of the name of Merritt, addressed the people who had been shipped as slaves, and told them they were at perfect liberty to go on shore if they pleased; information which they appeared to receive with great pleasure, and a general intimation of their intention to avail themselves of it. This took place in the presence of the chief mate of the vessel, who declared to myself, and, as I believe, to several others at the time, his perfect acquiescence in the measure, and refused (though urged to do so by the master of another American vessel, who happened to be on board), to forbid the approach of the boats, several of which, on signs from the negroes on board the Creole, had been brought near that vessel for the purpose of receiving them. I quitted the vessel myself in company with the police magistrate before any of the persons in question had left her, but was not many yards from her when I observed them crowding over her sides and getting into the boats. I have further to report that the inspector general of police, at the request of the mate remained on board of the Creole until the prisoners were removed, by which time, as that officer has informed me, only three or four of the persons shipped as slaves remained on board, and those expressing their determination to return with the vessel to America. In conclusion, I beg leave to state the departure of the negroes in question from the Creole was their own free and voluntary act, sanctioned by the express consent of the mate, and that neither myself nor any other of the authorities of the colony then on board interfered in the slightest manner to induce them to take that step; and, in corroboration of this and the previous statements, I have to refer your excellency to the police magistrate, the Inspector General of police, Mr. Justice Barnsides, Lieutenant Hill, the Receiver General and Treasurer, and Mr. Hamilton, the pilot of the bar, who were all present during the whole transaction.

I have the honor to be, Sir, your very obedient humble servant,

G. C. ANDERSON, *Attorney General*.

To His Excellency, Col. Sir F. Cockburn, Knight, Commander-in-Chief, &c. &c.

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communicated to the Senate consisted of two letters of the American Consul at Nassau to the Secretary of State; the official correspondence between him and the British Governor; the depositions of Woodside, Merritt, Gifford, Stevens, Ensor, Curtis, T. J. D. McCargo, and Leidner, taken by order of the British authorities, and the depositions of the same witnesses before the American Consul; the Protest at Nassau, made by Ensor, Gifford, Stevens and Curtis; and that at New Orleans, signed by Gifford as acting master of the Creole, Stevens as mate, Deveaux as cook, Speck, Silvy, Lecompts, Foxwell and Curtis as seamen, and Merritt, T. J. D. McCargo, and Leidner as passengers. The depositions conform substantially with the testimony of the witnesses as given by such of them as were examined on the trial.

Woodside's evidence was not taken under a commission; but his deposition before the American Consul, printed in this document, was used on the trial.* He deposes that on the 12th November (yesterday) this deponent was requested by the American Consul to go on board the brig Creole. That he went on board about ten o'clock, A. M., and soon after two white persons came on board, who he has since ascertained to be the Rev. Mr. Poole and the Rev. Mr. Aldridge, Episcopal clergymen, who were for some time in familiar conversation with the slaves, and appeared to be giving them directions and instructions, as he noticed the female slaves to be putting on their bonnets, and making preparations to leave the vessel. Deponent heard Mr. Poole say he was going to England, and it was requisite he should know all about this business, so that he could represent the thing. That about half-past ten or eleven o'clock, A. M., two magistrates, with a clerk, came on board to identify the criminals. That immediately on their coming on board, a sloop, a large lighter, and other boats, came on the starboard side of the vessel, and anchored within about two rods. That a number of small boats were at the same time around the vessel, all filled with black people, and no attempt was made to keep them away, except not to board the vessel. That at about twelve o'clock a boat with five white men came alongside, and were ordered off, though this deponent informed the officers that they had been sent by the American Consul to supply the place of

* The Reporter has been informed by one of the counsel for the defence, (Mr. Smith,) that attempts were made, at different places, to obtain the testimony of this witness, under commissions; but that, being a seafaring man, they were unsuccessful.

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those on shore. That from this time until half-past one, the boats continued to increase about the vessel. Deponent saw clubs passed from the sloop and lighter into all the small boats. About half-past one this deponent went on shore with one of the magistrates, and reported to the Consul the situation of things, the chief mate then being on shore. The Consul informed deponent the Governor and Council were in session, and he should probably soon know the result of their deliberations, and requested deponent and mate to wait. On his return from the Council Chamber he informed deponent and the mate, that the Attorney General and others had been directed to go on board, first send the criminals and troops on shore, and then to see that no obstruction was given to the slaves coming on shore, and to the boats going alongside, as they must be treated as passengers, &c. The Consul then requested us to go on board, and directed the mate to protest against all the doings of the Attorney General which should in any way liberate the slaves. That the deponent and mate in one boat, and the Attorney General and his party in another, left about the same time. The Attorney General first came alongside the large launch, and directed them to throw away their clubs; that no violence must be used; but that, as soon as the guard was ordered aft, word would be given for them to come alongside, and take away those that desired to leave. A number of clubs were thrown overboard. The two boats then immediately went alongside the brig, without communicating with more of the great number of boats which surrounded the vessel in every direction, except two or three on the starboard side. After a further examination and identification of more criminals, the Attorney General came on deck, and informed the prisoners that they stood charged with mutiny and murder, for which they must be detained in custody, and if any wished to see the affidavits, he would attend the jail to read them, or furnish them with copies, and if they wanted any evidence taken, he would attend to that for them. He then said to the other slaves, "Men, you are all free, you can go where you please," or words of the same import. That Mr. Pinder, one of those who accompanied the Attorney General, gave the word: "Boats, you can come alongside," which they immediately did, and made fast to the vessel, some of the blacks from the boats coming over the bows of the vessel. That in a few minutes most of the slaves had left the vessel. This deponent also heard threats made to the mate and crew that if any resistance was made, there would or might be bloodshed, and that they had better let them go quietly on shore. That the chief mate and crew were much intimi-

dated. That soon after the slaves had left the vessel, the criminals, with the guard, also left the vessel.

The facts recited in the Protest at Nassau, conform to the testimony subsequently given by the witnesses. The Protest made at New Orleans, so far as it relates to the occurrences subsequent to the arrival of the Creole at Nassau, is subjoined :

Ben. Blacksmith, Madison, Ruffin, and Morris, kept watch by turns the whole time, to their arrival at Nassau, with knives drawn. So close was the watch, that it was impossible to rescue the brig. Neither passengers, officers, nor sailors, were allowed to communicate with each other. The sailors performed their usual duties, and were allowed to go about as usual. The pilot that came on board as the brig approached Nassau, and all his men in the pilot-boat, were negroes. The pilot was acting under the legal authorities of the island. He and his men, on coming on board, mingled with the slaves, and told them they were free men ; that they could go on shore, and never could be carried away from there. One of the pilot's men told one of the female slaves, that he should claim her for his wife. The regular quarantine officer came alongside, and Gifford went on shore in his boat ; he conducted Gifford to the American Consul, who accompanied him to the Governor of New Providence and all the other Bahama islands. Gifford then related to the Governor all the facts relating to the voyage from Richmond to that port. The American Consul, in behalf of said vessel and all interested, requested of the Governor that he should send a guard on board to protect the vessel and cargo, and keep the slaves on board till such time as they could know what they could do. The Governor did so, and sent a guard of twenty-four negro soldiers, with loaded muskets and bayonets fixed, in British uniform, commanded by a white officer, on board. They took possession of the vessel and all the slaves. That from Tuesday, the tenth, till Friday, the twelfth day of November, they tried Ben. Blacksmith, Madison, Ruffin. and Morris, and put them in the longboat, placed a sentry over them, and fed them there. They mingled with the negroes, and told the women they were free, and persuaded them to remain on the island. Captain Fitzgerald, commanding the company, told Mary, one of the slaves owned by Thomas McCargo, in presence of many of the other slaves, how foolish they were, that they had not, when they rose, killed all the whites on board, and run the vessel ashore, and then they would have all been free, and there would have been no more trouble about it. This was on Wednesday. Every day the officers and soldiers were changed at nine o'clock, A. M. There are five hundred regular

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soldiers on the island, divided into four equal companies, commanded by four officers, called captains. There was a regular sentry stationed every night, and they placed all the men slaves, except the four that were tried, in the hold, and placed a guard over the hatchway. They put them in the hold at sunset, and let them out at sunrise. There were apparently twelve to thirteen thousand negroes in the town of Nassau and vicinity, and about three or four thousand whites. That, on Wednesday, the tenth, at about nine o'clock, A. M., three civil magistrates of the island came on board, and commenced examining all the white persons on board. They completed this examination on Friday following. On Friday, the Attorney General came on board with the three magistrates, and the depositions were signed. The American Consul was present the first two days. The magistrates were accompanied by a clerk. The Attorney General, on Friday, placed the nineteen mutineers in the custody of the captain of the guard, and ordered them upon the quarter deck. There were about fifty boats lying round the brig, all filled with men from the shore, armed with clubs, and subject to the order of the Attorney General, and awaiting a signal from one of the magistrates. A sloop was towed from the shore by some oar-boats, and anchored near the brig, and was also filled with men armed with clubs. All the men on the boats were negroes. The fleet of boats was under the immediate command of the pilot who piloted the brig into harbor. This pilot, shortly before the signal was given by one of the magistrates, said that he wished they would get through the business; they had their time, and he wanted his. The Attorney General then stepped on the quarter deck, and addressing himself to all the slaves, except the nineteen who were in custody, said: "My friends, you have been detained a short time on board of the Creole, for the purpose of ascertaining the individuals who were concerned in this mutiny and murder; they have been identified, and will be retained; the rest of you are free, and are at liberty to go on shore, and wherever you please." Addressing the prisoners, he said: "Men, there are nineteen of you who have been identified as having engaged in the murder of Mr. Hewell, and in an attempt to kill the captain and others; you will be detained and lodged in prison for a time, in order that we may communicate to the English government, and ascertain whether your trial shall take place here or elsewhere." At this time, Mr. Gifford, the mate of the vessel, then in command, the captain being on shore under the care of a physician, addressed the Attorney General, in the presence of the magistrates; protested against the boats being permitted to come

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alongside of the vessel, or that the negroes, other than the nineteen, should be sent on shore. The Attorney General replied, that Mr. Gifford had better make no objection, but let them go quietly on shore, for if he did, there might be bloodshed. At this moment one of the magistrates advised Mr. Merritt, Mr. McCargo, and the other passengers, to look to their money and effects, as he apprehended that the cabin of the Creole would be sacked and robbed. The Attorney General, with one of the magistrates, stepped into his boat, and withdrew into the stream, a short distance from the brig, where they stopped; a magistrate on the deck of the Creole gave the signal for the boats to approach; instantly, with a huzza and a shout, the fleet of boats came alongside of the brig, and the magistrate directed the men to remain on board of their boats; commanded the slaves to leave the brig and go on board the boats. They obeyed his orders, and passing from the Creole into the boats, they were assisted, many of them, by this magistrate. During this proceeding, the soldiers and officers were on the quarter deck of the Creole, armed with loaded muskets, and bayonets fixed, and the Attorney General, with one of the magistrates, in his boat, lay at a convenient distance, looking on. After the negroes had embarked on the boats, the Attorney General and his accompanying magistrate pushed out the boat and mingled with the fleet, congratulating the slaves on their escape, and shaking hands with them. Three cheers were then given, and the boats went on shore, where thousands were waiting to receive the slaves. That when this proceeding was over, and all the slaves, except the nineteen, landed, a barge was sent from the barracks to the Creole, to take on shore the nineteen prisoners, and the guard which had been left over them; they were taken on shore to the barracks, and the nineteen carried thence to prison. One of the nineteen died the day after he had been put in prison, in consequence of wounds received in the affray. During the investigation carried on by the magistrates on board the Creole, and on the evening of the same on which day the slaves and prisoners were landed the nineteen were recognised and identified by the witnesses. That many of the negroes who were emancipated expressed a desire to go to New Orleans in the Creole, but were deterred from it, by reason of threats, which were made to sink the vessel, if she attempted to carry the slaves. Three women, one girl, and a boy, concealed themselves on board of the Creole, and were brought to New Orleans in the brig; many of the male slaves, and nearly all of the female slaves, would have remained on the vessel and come to New Orleans, had it not been for the commands of the ma-

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gistrates, and interference as before stated. That on Monday following these events, being the fifteenth day of November, the Attorney General wrote a letter to Captain Ensor, informing him that the *passengers* of the Creole (as he called the slaves) had applied to him for assistance in obtaining their baggage, which was still on board the brig, and that he should assist them in getting it on shore. To this letter, Mr. Gifford, the officer in command of the vessel, replied, that there was no baggage on on board belonging to the slaves, that he was aware, as he considered them cargo, and the property of their owners, and that if they had left anything on the brig it was the property also of their masters; besides, he could not land anything without a permit from the Custom-House, and an order from the American Consul. That the Attorney General immediately got a permit from the Custom-House, but no order from the American Consul, and sent an officer of the customs on board the brig, and demanded delivery of the baggage of the slaves aforesaid to be landed in the brig's boat. The master of the Creole not finding himself at liberty to refuse, permitted the officer with his men to come on board, and take such baggage and property as they chose to consider belonging to the slaves. They went into the hold of the vessel, and took all the wearing apparel, blankets, and other articles of the negroes; also one bale of blankets belonging to Mr. Lockett, which had not been opened. These things were put on board of the boat of the officer of the customs and carried on shore, the master of the brig refusing to send them on shore in the brig's boat. That the correspondence which took place between the Attorney General and the master of the brig, is in the possession of the American Consul at Nassau. That on the next day, Tuesday, Captain Ensor proposed to sell a portion of the provisions on board the brig, in order to pay her expenses while lying at Nassau, having more than enough for the remainder of the voyage to New Orleans. The collector of the customs refused to allow the provisions to be landed, (consisting of several barrels of meat and navy bread,) to be entered, unless the slaves which had been emancipated should be likewise entered as *passengers*. The master of the brig refused to accede to this condition. The next day after the landing of the slaves from the Creole, the officers of the government of New Providence caused to be advertised a vessel for Jamaica, to take out passengers to that island (passage paid). A number of the slaves of the Creole entered their names for that said island. It was generally said by persons, white and black, that the object of putting this vessel up for Jamaica, was to carry away the slaves of the Creole. The cap-

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tain was so informed by the American Consul, and Mr. Stark, agent of the Boston Insurance Companies. That about two or three hours after the brig reached Nassau, Captain Woodside, of the bark Louisa, with the American Consul, came on board, and it was agreed that Captain Woodside, with as many of his crew as could be spared, and the second mate and four sailors of the brig Congress, should come on board with arms, and with the officers and crew of the Creole, rescue the brig from the British officers then in command, and conduct her to Indian Key, where there was a United States vessel of war. The Louisa and the Congress were American vessels, and the arrangement was made under the control of the American Consul. The captain was to come on board the Creole, with a part of the crews of the Louisa and the Congress, as soon as the Creole was ready to leave Nassau.

Frequent interviews were had every day with Captain Woodside, the American Consul, and the officers of the Congress, on the subject, and the whole plan was arranged. Accordingly, on the morning of the 12th of November, Captain Woodside, with the men in a boat, rowed to the Creole. The muskets and cutlasses were obtained from the brig Congress. Every effort had been made, in concert with the American Consul, to purchase arms of the dealers at Nassau, but they all refused to sell. The arms were wrapped in the American flag, and concealed in the bottom of the boat. As said boat approached the Creole, a negro in a boat, who had watched the loading of the boat, followed her, and gave the alarm to the British officer in command on board the Creole; and as the boat came up to the Creole, the officer called to them, "Keep off, or I will fire into you." His company of twenty-four men were then all standing on deck, and drawn up in line fronting Captain Woodside's boat, and were ready, with loaded muskets and fixed bayonets, for an engagement. Captain Woodside was thus forced to withdraw from the Creole, and the plan was prevented from being executed; the said British officer still remaining in command of the Creole. The officers and crews of the Louisa and the Congress, and the American Consul, were warmly interested in the plan, and every thing possible was done for its success. Indian Key is about four hundred miles from Nassau. The nineteen negroes had thrown overboard and burnt all their weapons, before their arrival at Nassau; and the aid thus offered of American sailors and arms, was amply sufficient for the management and safety of the Creole on her voyage. That if there had been no interference on the part of the legal authorities of Nassau, the slaves might have been safely brought to

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New Orleans. It was that interference which prevented aid from being rendered by the American sailors in Nassau, and caused the loss of the slaves to their owners. That on the same day on which the slaves were liberated, and before the Attorney General and the magistrates came on board, the American Consul and the captain had another interview with the British Governor. The Consul stated that they wanted time to write to Indian Key, on the Florida shore, to get a vessel of war of the United States to come and protect the brig and cargo on her voyage from Nassau to New Orleans, and a guard was wanted to protect the said brig and cargo in the meantime. The Governor refused to grant one for that purpose. The Consul then proposed to get the crews of the American vessels then in the port of Nassau, and place them on board the brig to conduct her to New Orleans, and requested the Governor to station a guard on board until the American sailors could be collected; but the Governor refused to station the guard as requested. A proposition was then finally made by the American Consul to the Governor, that the American seamen then in port, in American vessels, should go on board the *Creole*, and be furnished with arms by the Governor, for the purpose of defending the vessel and her cargo, (except the nineteen slaves who were in the fight, who were to be left behind,) on her way to New Orleans. This the Governor also refused. That on the 15th, the Consul, on behalf of the master of the brig *Creole* and all interested, proposed to the Governor to permit the nineteen slaves who were in the affray to be sent to the United States, on board of the *Creole*, for trial; and this too was refused. That two half boxes tobacco (marked L. Banks) were broken up and destroyed by the negroes, and about six or seven barrels lying on the deck of the brig were thrown overboard by the negroes, to make room for them to walk the deck; the contents of which said barrels they do not know. That on the 19th day of November the said brig sailed from Nassau, bound for the port of New Orleans, leaving Captain Ensor at said port, unable to proceed on the voyage in consequence of the severity of his wounds.

The *Log-book* of the *Creole* was also offered in evidence by the plaintiff.

The defendants introduced the evidence of *George Campbell Anderson*, the Attorney General of the colony of New Providence.

He deposed,* that he visited the *Creole* on the 12th of November, at the desire, and by the authority of his excellency

* This evidence, and that of the other witnesses for defendants was taken under a commission at Nassau, in April, 1842.

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Sir Francis Cockburn, Governor of the colony, and did so for the purpose of ascertaining whether an inquiry, which had been carried on, on board of such vessel for several days, relative to certain acts of violence alleged to have been committed on board of the Creole previous to her arrival at Nassau, had terminated, and, if terminated, to take the necessary measures for removing to the shore such persons as might be identified as participators in such acts; and the execution of this duty was, he presumed, entrusted to him in consequence of the office which he holds. That on getting on board the Creole, he had pointed out to him by the police magistrate, (who was one of the magistrates by whom the inquiry before referred to had been conducted,) eighteen persons who the police magistrate informed him had been identified by the oath of the mate and others, as having been concerned in the murder of a Mr. Hewell, and in the several other acts of violence alleged to have taken place on board of the Creole. The deponent then inquired of the mate whether he had any further evidence to adduce before the magistrates, and after some little delay, a person of the name of Leitener was produced, who identified one other of the black men as a party concerned in the acts before referred to; an affidavit to this effect having been sworn to by Leitener, and the mate having then informed witness that he had no further evidence to produce, witness requested Lieutenant Hill, the officer in command of the military guard, to take charge of the accused, (nineteen in number,) and at the same time informed those persons, that they would shortly be conveyed on shore, and there imprisoned until a representation of their case could be made to the British government, by whom it would be decided whether they should be delivered up to the American government for trial, or how otherwise dealt with. By this time, Lieutenant Hill had drawn his guard together on the quarter deck of the vessel, where witness requested him to keep the accused until he went on shore to make arrangements for their being received into the common goal.

Having thus disposed of the implicated parties for the time, witness turned to the chief mate, who was standing near him, and told him that as far as the authorities of the island were concerned, all restrictions upon the movements of the other persons on board of the vessel were removed, and requested the mate to cause every person on board the vessel to appear on deck in order that witness might communicate the same to them; with this the mate immediately complied, stating to witness, at the same time, that it was not his (the mate's) desire to detain on board the vessel any one of the per-

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sons shipped as slaves, who did not wish to remain, and that had his free permission to quit her if they thought proper to do so ; but that he was apprehensive that the persons in certain boats, which were then, and had been during the previous part of the day, lying in the immediate vicinity of the Creole, would, as soon as the military were withdrawn, board his vessel and commit acts of robbery and other violence. In reply to this, witness distinctly told him, the mate, that he had no instructions to interfere between himself and the persons he called slaves, but that with respect to his fears of being attacked from the people in the boats, precautions had been already taken to guard against such an event, and that he might rely upon being protected by the authorities of the island against any violation of the law. In a short time the mate informed him that all the persons on board were assembled on deck. They appeared to consist principally of black and colored persons, to the number of about one hundred. These persons being so assembled, witness addressed them, and told them that on the arrival of the Creole in this harbor, information had been laid by the mate before the Governor of the colony, charging a murder and certain attempts at murder to have been committed on board of the vessel, and that the protection of the authorities here having been claimed by the American Consul, a guard of soldiers had been placed on board for the purpose of preventing any persons from quitting the vessel until an examination could take place, whereby the real perpetrators of the alleged act of violence might be discovered ; that such examination had now concluded, and without any criminatory evidence having been adduced against any of the parties whom witness was addressing ; that such being the case, he had to inform them that as far as the authorities of the island were concerned all restrictions on their movements were removed. Witness had no sooner concluded, than a white man, who, he was informed, was a passenger, of the name of Merritt, and who was standing just below witness, on what, he believes, is called the main-deck, stepped forward, and told the colored persons that it was not the wish of any one belonging to the vessel to detain them on board against their wills ; that they were at liberty to go on shore, or stay and continue the voyage, as they thought proper ; that, as they were in a British port, they would, by going on shore, become free, and he called upon them to say what they would do. A shout almost immediately rose from among the colored persons, who appeared to witness at the time with one voice to express their determination to quit the vessel, and immediately the boats before mentioned commenced nearing the vessel ; during the time that this took place,

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the mate, Gifford, was standing next to witness, and as the boats were approaching close to the vessel, a person, (who he afterwards understood was named Woodside,) said to Gifford that he ought to protest against what was taking place, when Gifford replied that he would not, and turning to witness again expressed his perfect willingness that the people should go on shore. Immediately after this took place, witness accompanied by the police magistrate, quitted the vessel. That immediately after his quitting the vessel, he observed numbers of colored persons crowding over her sides and getting into the boats which were then alongside of her. On his getting to the shore he directed the provost-marshal to proceed on board and take charge of, and bring on shore the nineteen persons before particularly mentioned, and in the course of that evening the provost-marshal reported to him that he had done so, and had lodged the accused parties in the common goal. With the exception of those nineteen the leaving of the said vessel by the colored persons appeared to be, and was, as witness verily believes, entirely voluntary, but as to their ages and appearances he cannot depose. The names of the nineteen persons so accused are George Grundy, Adam Carnay, Madison Washington, Ben Johnson, Elijah Morris, Doctor Ruffin, Richard Butler, Philip Jones, Robert Lumpkins, Peter Smallwood, Warner Smith, Watter Brown, American Wordhouse, Horace Beverley, Addison Tyler, William Jenkins, George Burden, George Portlock, and Pompey Garrison; George Grundy and Adam Carnay have, as he has been informed, since died, and the remaining seventeen were, on the sixteenth of this month, liberated by an order of the judges of the Court of Admiralty Sessions of this colony.

On his cross-examination this witness stated, that he is a member of Her Majesty's Executive Council of the colony, as also Her Majesty's Attorney General for the colony, both of which situations are held during pleasure, and he has held the first for about fifteen months, and the other between four and five years; the first is merely an honorary appointment, the latter one of emolument; as a member of the Executive Council, he is a sworn adviser of the representative of his sovereign in this colony; and as Attorney General, he performs all those forensic duties, which appertain to the office of a crown lawyer. That he is of European descent, and is in no way connected by descent with the African race. That he is not aware of having ever openly declared any particular views on the subject, but has no hesitation in saying, that he is favorable to a general emancipation of slaves, without reference to the particular nation to which they may belong. That he holds that, as

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slavery is abolished throughout the British dominions, the moment a vessel comes into a British port with slaves on board, to whatever nation such vessel may belong, and however imperious the necessity may have been which drove her into such port, such slaves became immediately entitled to the protection of British laws, and that the right of their owners to treat and deal with them as slaves, ceases. That he has perused the copy of the protest referred to, and finds several allegations mentioned in it which are wholly untrue. First: That part of the protest which alleges that the boats were subject to the order of the Attorney General. Second: That part which alleges that Gifford addressed the Attorney General, and protested against the boats being permitted to come along side, and that the negroes, other than the mutineers, should be sent on shore: as also, that part which alleges that the Attorney General replied, that Gifford had better make no objection, but let them go quietly on shore, for if he did there might be bloodshed. That the whole of the above mentioned statement is a complete fabrication, nothing in the slightest degree similar to it having taken place, but, on the contrary, Gifford, in his, witness' presence, not only refused to protest when urged to do so by Captain Woodside, but expressly told witness that he had no objection whatever to the persons in question landing, if they wished to do so. Third: That part which alleges, that after the negroes had embarked in the boats, the Attorney General and magistrate pushed out their boat and mingled with the fleet, congratulating the slaves on their escape, and shaking hands with them. Fourth: All that part in which the Attorney General is mentioned, as concerned in any way with obtaining the landing of the baggage of the slaves. That witness never wrote a letter to Captain Ensor, nor was concerned directly or indirectly in obtaining the landing of the baggage of the persons referred to. Fifth: That part also, which pretends to set out the words made use of by deponent in addressing the slaves, is partially untrue, deponent never having made use of the words, "you are free and at liberty to go on shore, and wherever you please." That witness purposely avoided making use of language similar to that set forth, for although he considered that the persons referred to were indisputably entitled to their liberty, and had the same right as the other persons on board of the Creole to visit the shore, and to remain there if they thought proper, yet he did not conceive that it was necessary that there should be any interference on the part of the authorities to enable them to exercise such right.

The foregoing contradictions he makes from his own knowledge, as the allegations refer to himself individually. He also

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knows that part of the protest to be untrue which alleges that a vessel was put up by the officers of government for Jamaica. He also believes all such parts of the protest as go to allege that the boats were waiting the signal of a civil magistrate, and that such signal was made by a magistrate, to be entirely untrue. And he verily believes that if such had been the case, that he must have known it. There are also various other parts of the protest which he believes to be untrue. In answer to the question, whether an American citizen, owner of a slave on board of an American vessel in the port of Nassau, would be permitted by the local authorities to exercise that control over his slave at that place, which such owner would be permitted to exercise in a country where the rights of a master over a slave are fully recognized, and where the person standing in the relation of a slave is bound to implicit obedience?—the witness stated, that British laws do not recognize the relation of master and slave, and therefore, as a matter of course, in the case supposed, the person termed a slave would be considered and treated by the local authorities as a freeman. Being asked, whether if such an American owner had used violence or blows, or put such slave in fetters to enforce his control as master over the slave, would or would not the British authorities at Nassau, upon application to them or upon their knowledge of the facts, have interfered to prevent the master from using any such means to enforce his control over the slave, or have punished him if he had used them?—he answered, that he decidedly thinks in a case similar to the one supposed, that it would be the duty of the local authorities to interfere, to prevent and to punish conduct similar to that supposed, in the same manner as it would be the duty of the authorities to interfere to preserve the peace, and to punish offences committed in the port of Nassau, by one white American citizen on another. On being asked, whether if Captain Woodside and others had joined the officers and crew of the *Creole*, and fired upon the blacks in the musquito fleet when they advanced upon the *Creole*, and killed any of the negroes belonging to the *Creole*, for attempting to go ashore at Nassau, would or would not all the American citizens concerned in these deaths, have been hanged as murderers?—witness stated, that he is of opinion that such killing would have been murder, and that all the parties concerned therein would have been liable to the pains and penalties attaching to that crime.

On being asked: Can you state positively, that no officer, civil or military, of the island of Nassau, did either directly or indirectly aid, countenance, advise, encourage or assist in any manner the slaves or negroes on the *Creole* to obtain their

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liberty? Can you state the same as to the people of the island black and white? Witness answered, that the authorities of the colony were passive on the occasion referred to; they neither interfered to prevent the landing of the persons in question after the investigation had terminated, nor did they interfere to induce the carrying into effect such landing, save and except so far as relates to the nineteen accused parties. With respect to the black and colored population of the island, he believes that a great number of them did, as far as they possibly could, without proceeding to acts of violence or breaches of the law, aid, countenance, encourage and assist the persons in question in landing from the vessel. That a number of the colored persons who arrived on the *Creole* are still in Nassau; others, he believes, have left for Jamaica, but he knows nothing on this latter point of his own knowledge. That he has set forth truly and correctly every circumstance coming within his knowledge, and has truly stated the substance of every word uttered by him while on board the *Creole*, having any connection with the matters at issue between the parties to this suit: as also, of what was said to him by Gifford, the mate, and what he heard said by Merritt, the passenger. That he has already stated every particular connected with the landing of the people in question from the *Creole*. With respect to what was done by the Governor, he can only say that, at the request of the American Consul, the Governor sent the military guard before mentioned on board; that he caused the enquiry before mentioned to be carried on by the police magistrate, assisted by another justice; and that he sent deponent on board as before stated; and that he afterwards caused the accused parties to be detained in custody until the decision of his government, to whom he made a full report of the case, was made known.

The deposition of the Attorney General as to the addresses made by him on board the *Creole*, and as to the remarks of Merritt to the slaves, is confirmed by the testimony of all the witnesses examined on behalf of the defendants, who were present at the time. These witnesses all concur in declaring that, with the exception of the nineteen implicated in the murder, all the negroes who left the brig did so voluntarily, and without any inducement or encouragement from the colonial authorities, civil or military. They contradict the statements in the protest in many other respects, as to the number of boats around the *Creole*, the fact of the magistrates having assisted the negroes into the boats, &c.

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Hamilton, a lieutenant in the British navy, and branch pilot, and magistrate at Nassau, deposed, that when the Attorney General had finished his address, "that Mr. Merritt, one of the passengers, (a white person,) then stepped forward, and addressing the colored people, told them, that there was no wish or intention to prevent them from going on shore, but that they might either go or stay as they pleased. That to these exact words he would not depose, but that the person whom he understood was Merrit, used words to that effect, and with precisely the same meaning. He does most solemnly swear, that so soon as the last speaker had finished, Captain Woodside came to him and said: 'If I had been Mr. Merritt, I would not have acted as he has done, but would have protested against their leaving the vessel;' thus openly acknowledging, that free permission had been given, without the slightest intervention of any of the authorities. That the mate Gifford expressed his fears, that a disturbance would take place, upon the authorities leaving the vessel, and the boats coming alongside. Upon which he (witness) spoke to the Inspector-General of the police, and both of them offered to remain on board, and promised that they would prevent any person from coming on board, which offer was gratefully accepted. That so soon as the boats came alongside, they ordered that no person should come on board, and that the colored people jumped and scrambled into the boats as fast as they could, without a word being spoken to them. Their leaving was, therefore, voluntary. After all but four or five had left the brig, some of the colored people in the boats asked them, if they also were not coming; but they were desired not to interfere, but to allow every person to do as he pleased. That accordingly those persons remained, and the others in the boats left for the shore, where he (witness) also went. That Gifford, on the morning before witness went on board, expressly stated to him, that it was not his intention to endeavor to prevent the negroes from landing, as he was determined not to go to sea again with these people."

Pinder, the Inspector-General of police of the Bahama Islands, confirmed the evidence of Anderson and Hamilton. He further deposed, that "the leaving of the brig by the negroes was their own voluntary act, sanctioned by the mates then in charge, who expressed a wish to him (witness) to get rid of them, inasmuch as their lives were in danger while the colored passengers continued on board, and declared that they would not proceed on the voyage with them, and requested him, as an officer of the police, to remain on board for their protection until they went on shore, which he did. The person calling himself second mate further told him, that the chief mate and himself had told

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the colored persons, previous to his (witness') going on board, that they could not be carried from this port contrary to their wish."

Dalzell, a serjeant of police, who acted as clerk in taking the depositions under the orders of the colonial Governor, deposed, "that he distinctly heard Mr. Merritt, after the Attorney General informed those against whom no charges had been brought, that the restrictions which it had been necessary to place over them were then withdrawn, state to those persons, (the colored passengers,) that they were free, and that they could stop on board, or go on shore if they pleased; that he distinctly heard Mr. Gifford, Mr. Stevens and Mr. Merritt state, on the quarter deck of the brig, that they would not stop on board with the colored passengers if the authorities took away the military guard, as they did not consider themselves safe. Mr. Gifford, the first mate, never did, by any means whatsoever, endeavor to hinder the colored passengers from leaving the vessel, but appeared more satisfied to be left on board by himself with the white passengers and the crew of the vessel."

Burnside, the Surveyor-General of the colony, who had accompanied the police magistrate on board by desire of the Governor, corroborated the evidence of the other witnesses for the defence.

John Grant Anderson, the Receiver-General and Treasurer of the colony, deposed, "that he was on board of the Creole on the day on which the American negroes quitted her. He heard the Attorney General's address to the prisoners and others on board; it was uttered in a loud tone of voice from the front of the poop deck. He was standing on the larboard side of the main deck, near the main mast, and is positive the Attorney General never made use of the words: 'You are free, and at liberty to go on shore and wherever you please;' but after the Attorney General had ceased speaking, Merritt, from about the same place from which the Attorney General had addressed the people, also addressed them, telling them they were free to go on shore or wherever they pleased—if they wished to leave the vessel they could do so: upon which the boats in the vicinity of the vessel were called alongside, he believes, by the American blacks, and the disembarkation immediately commenced. He is so positive as to Merritt's giving the people the permission he has stated, as Merritt had been previously standing on the larboard side of the deck with him, and had asked him to tell the people, there was no wish to detain them, provided they desired to go on shore; but not having come on board in any official capacity, he told Merritt that interference on his part might be

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injudicious, and advised him to make known his wishes to the Attorney General and magistrates, then standing upon the star-board side of the poop or quarter deck, and Merritt immediately passed over to him. He does not know what might have passed in conversation between these gentlemen, but he is positive as to the facts he has stated as to their addresses to the people, every word of which he could distinctly hear from where he was standing, complete silence and order prevailing at the time."

Mends, Glubb, Fitzgerald and Murray, lieutenants in the second West India Regiment of British troops, were examined and confirmed, as far as they had any knowledge of the facts, the testimony of the other colonial officers. Lieutenant Hill, who commanded the guard on board, the day it was withdrawn with the 19 charged with mutiny and murder, testified "that the mate, together with Mr. Merritt, and the officers of the brig, repeatedly asked witness whether he had any orders to withdraw the guard, and requested him to notify them of his intention, if such should be the case, as they were afraid to remain with the people without protection. This was of course previous to the negroes having left the brig."

Cobbe, a Major in the 2d British West India Regiment, deposed, "that the Governor desired him, on the morning of the arrival of the Creole in the harbor of Nassau, to send an officer and guard on board of her, which he told witness had been applied for by the American Consul. That the muskets of the soldiers were by his orders, and not by those of the Governor, loaded, from a fear that the negroes on board, on seeing the approach of a military guard, might resist, and with the sole and only view of preventing and putting down any violence which might originate with them, and with respect to the taking possession of the vessel. The officer's orders, which were given by him in writing, were not to interfere, but to prevent violence, and to allow no one to come on board except the authorities, and not to permit any of the negroes to land until an investigation had taken place, when he would receive further instructions, but to allow the crew to do just as they pleased. It is false, that there were fifty boats about the brig filled by negroes. The number of boats, excluding those belonging to officers and persons in official capacities on board of the brig, did not exceed five, if there were so many. There was one large launch, and three boats were lying off about her, no boat having been allowed to come alongside except those which had brought persons official-

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ly occupied on board. There may have been sticks in the boats, but at the time he arrived on board he observed none. It is also false, that the slaves who returned to New Orleans, were obliged to secrete themselves, inasmuch as he himself saw three of them, after all the others had left the vessel, upon deck, and before the guard and prisoners had been removed, and who were as much at liberty to go on shore as the other negroes, had they so desired."

Gifford, who was re-examined after the testimony of the defendants' witnesses had been taken, deposed "that Merritt made use of no such language as is stated in the testimony of G. C. Anderson, the Attorney General; that he did not step forward, and tell the slaves, 'that it was not the wish of any one belonging to the vessel to detain them on board against their will;' 'or that they were at liberty to go on shore, or stay and continue the voyage, as they thought proper; that, as they were in a British port, they would, by going on shore, become free; and he called upon them to say what they would do.' If Merritt had said anything of the kind, witness would have heard him; the whole of it is a fabrication. That it is utterly false, as stated by Hamilton, 'that witness, the same morning, before he, Hamilton, went on board, stated to him that it was not his intention to prevent the negroes landing, as he was determined not to go sea again with those people.' That witness protested against the boats being permitted to come alongside of the vessel, or the slaves going on shore; and it is a fabrication that witness ever remarked, 'that he would not stop on board of the brig, or take charge of her to her destined port, with the slaves on board,' as stated in Dalzell's testimony. Witness never expressed to the Attorney General his willingness that the slaves should go on shore; and had no further conversation with him than what has been already stated. Captain Woodside never said to witness, that he ought to protest against what was taking place, and witness never said to Captain W., that he would not, as stated in the Attorney General's deposition."

T. J. D. McCargo, whose evidence was also taken after the testimony of the defendants had been received, declared, 'that he did not hear Mr. Merritt make use of any such words as stated in said depositions; that Mr. Gifford protested against the boats coming alongside, and the negroes going on shore. Witness never heard Mr. Stevens remark that he would be glad to get rid of the slaves, nor any one else on board. Witness is positive that the Attorney General said to the slaves, "you are free, and at liberty to go on shore, and where you please." He was standing near the Attorney General.'

Stevens, on his re-examination by the plaintiff, after the defen-

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dants had introduced their evidence, deposed "most positively that the statements made by defendant's witnesses, as to what was said by Wm. H. Merritt, Z. C. Gifford, L. A. Stevens, and G. C. Anderson are not true. The Attorney General made use of the words, to the slaves, except the nineteen who were in custody: 'My friends, you have been detained here for a short time, for the purpose of finding out who were engaged in the mutiny, and murder of Mr. Hewell, on board of the brig, on the high seas; and that nineteen had been identified, and would be lodged in jail, till he could communicate with the English government as to what was to be done with them. The rest are free, and at liberty to go on shore or where they pleased.' He then turned round and waived his handkerchief to the boats, which surrounded the brig; as also did the other magistrates, &c., who accompanied the Attorney General. Witness is positive that the Attorney General made use of the words—'The rest are free and at liberty to go on shore or where they pleased;' and that the Attorney General did not say, 'there will no longer be any restraint upon persons on board.' Witness was standing within six feet of the Attorney General when he spoke to the slaves, and could not be mistaken in what he said. Mr. Merritt did not tell the slaves that they might go or stay as they pleased, nor did he say any thing to them that he heard; witness would have heard it, if he had said anything to them. That witness heard Mr. Gifford protest to the Attorney General, against the boats coming alongside and against the negroes going on shore. This was in the morning of the 12th of November; after Mr. Gifford had come with Captain Woodside in the boat to the brig, after the address of the Attorney General. Witness did not (as stated in John Pinder's testimony) express a 'wish to said Pinder to get rid of the slaves, in as much as their lives were in danger while the colored passengers continued on board, and declared that they would not proceed on the voyage with them, and requested him, as an officer of the police, to remain on board for their protection, until they went on shore.' The whole of the above is false. Witness never did tell said Pinder, 'that chief-mate and himself (witness) had told the colored persons, previous to his (Pinder's) going on board, that they could not be carried from this port contrary to their wish.' Witness never spoke to said Pinder."

There was a verdict and judgment below in favor of the plaintiff for \$18,400,* from which the defendants appealed.

* The amount sued for was \$20,800. The jury deducted \$800 for one of the

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F. B. Conrad, T. Slidell and Benjamin, for the appellants.

The policy in this case is on certain slaves, at and from Norfolk to New Orleans, "beginning the adventure upon said goods and merchandize from and immediately following the loading thereof on board the said vessel, at Norfolk aforesaid."

The policy contained the following written clause: "This policy covers all risks; and chiefly that of foreign interference. Warranted by the assured free from elopement, insurrection and natural death."

I. The risk in this case never commenced. The slaves of plaintiff were never put on board at Norfolk, but some at Richmond, and some a few miles below Richmond. All the testimony is concurrent to show that the vessel never was at Norfolk at all: that it never approached nearer to Norfolk than twelve miles. Some slaves were brought from Norfolk to the vessel, as she lay twelve miles distant, in Hampton Roads, but none of these belonged to plaintiff. 1 Phil. on Insurance, 441. *Murray v. Columbian Insurance Company*, 4 Johnson, 442. *Graves v. Marine Insurance Co.*, 2 Caines, 340. *Constable v. Noble*, 2 Taunton, 405. *Payne v. Hutchinson*, 2 Taunton, 405. *Hughes on Insurance*, 147-8.

II. The insurers are discharged, the vessel not having been seaworthy. She was unseaworthy in consequence of not being furnished with arms; from the want of proper precautions and discipline with regard to the slaves; and from the numbers crowded into so small a vessel. See 1 Phillips, 308, 311, 329, *Fontaine v. Phœnix Insurance Company*. 10 Johns. 57. 3 Kent's Comm. 288. If we consult the log-book, a daily record made before the loss, and better entitled to consideration than testimony collected subsequent to the loss, we shall find that it shows a cargo of one hundred and eighty-six slaves; 150 on board on the 25th October, three taken on board at Day's Point on the 27th, and thirty-three taken on board on the 28th October. The testimony subsequently taken declares there were only 135; the discrepancy, however, is very lamely and unsatisfactorily accounted for by Gifford, who says, "he asked the captain how many slaves he *expected* to have on board? he replied from *one hundred and fifty to two hundred*. Deponent made the entry of 150 on the log book, and let it remain so."

Let us suppose, however, that there were not 186 slaves, but only 135. Of these it is shown by Gifford's evidence that about

slaves who reached New Orleans in safety. A further sum of \$1,600 appears to have been deducted, as half the value of four of plaintiff's slaves, who were proved to have taken part in the insurrection, the jury being of opinion that their loss should be divided between the insurers and the plaintiff.

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two-thirds were males; this gives 90 males. The tonnage of the Creole was 157 25-95ths tons. Was not this an excessive cargo, both on the score of humanity and safety. The act of Congress of 2 March, 1819, (which does not indeed apply to the very same subject matter, but which may well be invoked for the purpose of showing what humanity would dictate), forbids the carrying of more than two passengers for every five tons; the extent to which the Creole could have gone, had her passengers been ordinary passengers, would have been 63. Now this act of Congress was based upon considerations of humanity, and it was deemed necessary to enact such a law, although our country has always been disposed to encourage the immigration of foreigners. Will this court be disposed to recognize one standard of humanity for the white man, and another for the negro. Will any reasonable man say that 135 negroes would be as cheerful, contented and indisposed to insurrection, under such circumstances of discomfort, as they would have been in a larger and more commodious vessel?

But again—two-thirds of the slaves, say ninety of them, were males; there were ten whites, all told, comprising the crew of the Creole, and four white passengers, T. J. D. McCargo, Hewell, Merritt and Leidner.

Now considering this immense disproportion of the whites to the blacks, common prudence would have dictated two precautions—one, that the whites should have been armed—the other that a strict police should have been maintained. Both were entirely neglected.

No candid mind can compare the great disparity of physical force, can consider the nature of the slave, and his ever wakeful and ever active longing after liberty, can reflect upon the utter absence of an armament on the part of the whites, and the preparation on the other hand of the blacks, can mark the neglect of wholesome discipline, and of reasonable precaution by the officers and agents throughout the voyage, and especially when they approached British territory, without arriving at a clear conviction that this vessel was neither properly equipped nor prudently governed. If we view the whole evidence practically and disinterestedly, we surely cannot undertake to say that this insurrection would have occurred, that the control of the vessel would have been usurped and the vessel and slaves have gone into Nassau harbor, if the vessel had been properly armed, and a reasonable discipline had been maintained on board of her. One of the great and wholesome principles of insurance law has been palpably violated. The vessel was not seaworthy, either in equipment or management, considering the nature and purpose of her voyage.

Conscious of their indefensible position on the score of prudence and reason, the plaintiff attempts to bolster up his cause by evidence of usage. The captain, mate and sailors are called upon to establish principles of law under the *convenient* form of usage, to justify the absence of arms, the omission of reasonable precaution when the slaves came on board, and the subsequent neglect of police and discipline.

A custom, to obtain the force of the law, must have been not only of long continuance, and have received the general acquiescence, but it must have its foundation in *reason*. "Customs must be reasonable," says Blackstone, vol. 1, p. 53, [77].

"Four properties are essential to a custom," says Petersdorf, "viz: a *reasonable* commencement; to be certain; to have a continuance; and not to be against the king's prerogative." *Verbo Custom*, p. 482.

Pour qu'une coutume soit censée véritablement introduite, il faut que ce soit *au défaut de la loi*, ou du moins que la loi ayant cessé d'être utile, ait cessé d'être exécutée; que la coutume soit conforme à la *raison* qui doit être le fondement de la loi qui n'est pas écrite, aussi bien que de la loi écrite; qu'elle soit autorisée par le consentement de celui qui a droit de faire des lois; enfin qu'elle ait toujours été observée, c'est à-dire, qu'on ignore le tems qu'elle a commencée d'être mise en usage, car une coutume invétérée sert de loi. *Clef des lois Romaines—Verbo Coutume*, vol. 1, p. 98.

Consuetudinis ususque longœvi non vilis auctoritas est verum non usque adeo sui valitura momento, ut aut *rationem vincat*, aut legem codicis Lib. VIII. Tit. LIII. 2. And Blackstone, in the same spirit, tells us, when a custom is actually proved to exist, the next inquiry is into the legality of it: for if it is not a good custom, it ought to be no longer used. *Malus usus abolendus est*. Blackstone, vol. 1, p. 52.

But if the usage contended for by the plaintiff were clearly established, it would be repudiated by the courts, as inconsistent with prudence and common sense. An usage that trifles with safety is not to be tolerated.

III. The occurrence of an insurrection of the slaves put an end to the risk. This was an occurrence against which the assured warranted the underwriters. On the breach of the warranty the risk terminated.

If the clause in the policy be indeed a warranty, the conclusion that on its breach the underwriters were discharged, is not contested; but it is strenuously contended that this is not a warranty; that it is an exception of certain risks; and the following passage is relied on, contained in 1 Phil. p. 34: "As any statement of a fact in the policy is a warranty, though neither

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the word *warrant*, nor any formal expression of like import is used, so there is frequently a warranty in form, where there is none in fact. The insured often *warrants* the property *free from average, free from detention or capture*, or from other losses and perils, which is no more than an agreement that those shall not be amongst the perils and losses insured against, and for which the underwriter is to be liable. Although these forms of expression are sometimes spoken of as warranties, it would be absurd to consider them as such in their character and construction, since, in the case of an insurance *free from average*, for instance, it would be adopting the doctrine that the occurrence of an average loss would render the policy void, and consequently that the happening of a loss which is not insured against deprives the assured of the right to recover for one that is insured against."

One of the plaintiff's counsel went so far as to assert as a principle of insurance law, that there could be no *warranty*, technically so termed, except of a fact within the power and control of the assured; and another stated in argument, that when, in a policy, the assured stated, "I warrant," the law construed this into "I do *not* warrant." The extremes to which counsel are driven are generally sure indications of the weakness of their positions; and, we think, it not difficult to show that the law of insurance is not in this particular as *absurd* as it is stated to be.

We understand Mr. Phillips to mean by the remarks above quoted, that parties sometimes ignorantly use a word in a wrong sense, and that such misapplication of a term cannot change the nature of the thing itself. If a man say I *sold* my horse for a hundred bushels of wheat, his misapplication of the word "sold" cannot change the nature of the contract from an *exchange* into a *sale*: and thus, says Mr. Phillips, if a man says in a policy *warranted free from general average*, he only means that the risk of general average is excepted from amongst the responsibilities of the underwriter and assumed by himself. But we believe it to be an incontrovertible proposition, that language is to be understood in its usual and proper sense, if it can be applied to the subject matter in that sense. Now, how can it be pretended that, in the nature of things, it is impossible to warrant against an insurrection of slaves insured? Is it because it is a future event? Or is it because, as contended by one of the counsel it is a matter beyond the control of the assured?

Admitting what is very questionable, and what might indeed be confidently asserted to be incorrect, that an insurrection of the slaves was a matter beyond the control of the assured, let us see whether, by reason or authority, the plaintiff's pretensions

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can be sustained. One of the most familiar warranties is that of sailing with convoy. Suppose a vessel insured from London to any port in the Mediterranean, *warranted to take convoy at Gibraltar*. Here is a future event.

Now suppose the vessel to be detained by head winds or calms until after the departure of the convoy from Gibraltar, could a departure without convoy be excused on the ground now assumed by the plaintiff, and the underwriters held liable notwithstanding the breach of the condition on which they consented to bind themselves?

Suppose a vessel bound from Natchez to New-York, *warranted to take four additional seamen at New-Orleans*, and that the assured, by reason of an epidemic in New-Orleans, should be utterly unable to comply with his warranty, would the underwriters remain liable on the voyage, if continued without this addition to the crew?

Now in what manner can the present warranty, that there shall be no insurrection of the slaves of the accused, be distinguished from those just cited?

Marshal, vol. 1, p. 347, (Condy's ed.) expressly divides warranties into *affirmative* and *promissory*. He cites among *promissory* warranties, that the ship shall sail on or before a given day; that she shall depart with convoy; that she shall be manned with a certain complement of men, etc. So in this case, that the slaves shall be submissive; that they shall not become insurgents or mutineers. He says that a warranty is a condition precedent; its breach consists either in the falsehood of an affirmative, or non-compliance with an executory stipulation. "In either case the contract is void, *ab initio*, the warranty being a condition precedent; and whether the thing warranted was material or not; whether the breach of it proceeded from fraud, negligence, misinformation, or any other cause, the consequence is the same. The warranty makes the contract hypothetical; that is, it shall be binding, *if* the warranty be complied with. With respect to the compliance with warranties, there is no latitude, no equity; the only question is, has the thing warranted taken place or not? If not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of the warranty."

And the same writer, when speaking of the causes to which non-compliance may be attributed, at p. 349, says: "It is also immaterial to what cause the non-compliance is attributable, for if it be not in fact complied with, *though, perhaps, for the best reasons*, the policy is void. The condition has not been performed, or the contingency has not happened, on which the contract was made; and *the underwriter has a right to say*

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that there is no contract. Therefore, if a ship be warranted to sail on a given day, and she be prevented by any accident, as the sudden want of repairs, the appearance of an enemy, etc., from sailing till the next day, though it may be right in such case not to sail upon the day, yet the warranty is not complied with, and there is an end of the policy."

In *Hore v. Whitmore*, Cowper, 784, Lord Mansfield held, that an irresistible force, *though one of the perils insured against*, would not excuse a non-compliance with a warranty. See Marshall's observations on the case, vol. 1, p. 352.

In *Smith v. Readshaw*, where the ship insured arrived at the place of rendezvous *before the time appointed for the convoy to sail*, but, finding the convoy gone, put herself under the protection of a man-of-war, *which came there to join the squadron which composed the convoy, and, under her protection, joined the convoy*, but without obtaining sailing instructions, the warranty was held to be broken, and the insurers discharged. 1 Marshall on Ins. 262.

How do these decisions compare with plaintiff's position, that in the present case there is no warranty, although the assured expressly agrees to warrant, because the promise was of a future event, over which the assured had no control.

Suppose an assurance against a capture only, and a warranty by assured against the vessel's losing any of her sails or spars by stress of weather, could the assured recover if the vessel, being dismasted by a storm, should afterwards be captured by an enemy?

In this case there is insurance against British interference, with a warranty by the assured that his slaves shall not mutiny. They do mutiny, and carry the vessel within British jurisdiction. Of what value is the warranty to defendants, if they are held to be liable for the direct consequences of the very contingency against which they were warranted.

The palpable meaning of the contract is, we will assure you against British interference, but you must warrant that your slaves will not expose us to that interference by a mutiny.

IV. But if this clause in the policy be construed into a mere excepted risk, instead of a warranty, the result will be equally fatal to the plaintiff's claims. His slaves were lost by the excepted risk; *i. e.* by the insurrection; and have not been recovered to the present hour. The mutiny then was the proximate cause of the loss, even if a British interference to aid the slaves on their arrival at Nassau were clearly proved. See *Duval v. Com. Ins. Co.* 10 Johns, 279. *Patrick v. Com. Ins. Co.* 11 Johnson, 9. *Waters v. Merchants' (Louisville) Ins.*

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Co. 11 Peters, 219. *Peters v. Warren Ins. Co.* 14 Peters, 109-10.

V. It is clear that as soon as the mutiny was consummated, the destination of the vessel was changed, the intended terminus of the voyage was abandoned, and a new one substituted.

An unjustified deviation destroys all claim against the underwriters. Was the deviation in this case justified? This question depends wholly upon another question, viz: who is answerable for this insurrection and its consequences? The underwriters, or the owner of the slaves?

The general principle has been universally recognised in civilised countries where the institution of slavery has existed, that the master is answerable for the wrong doing of his slave.

Thus, among the Romans :

“ Ex maleficiis servorum, veluti si furtum facerint, aut bona rapuerint, aut damnum dederint, aut injuriam commisserint, noxales actiones proditæ sunt ; quibus domino damnato permittitur aut litisæstimationem suffere, aut ipsum hominem noxæ dedere.” Justinian’s Institutes, Lib. iv. Tit. viii.

The same principle is recognised in Merlin, *Repertoire de Jurisprudence*, vol. ii. p. 75, title Esclavage :

“ En cas de vol ou d’autre dommage causé par l’esclave, outre la peine corporelle qu’il subit, le maitre doit en son nom reparer le dommage, si mieux il n’aime abandonner l’esclave ; cequ’il doit opter dans trois jours.”

The Civil Code of Louisiana, art. 2300, declares: “ That the masters of slaves are responsible for the damage occasioned by them ; the master, however, has the right, as established under the title of master and servant, of abandoning his slave in discharge of his responsibility ;” and art. 180, that “ the master shall be answerable for all the damages occasioned by an offence or quasi-offence committed by his slaves, independent of the punishment inflicted on the slave.”

Unless the underwriters have *expressly* taken upon themselves the liability for a loss arising from an insurrection of the slaves of the assured, the principle above established would clearly throw upon the plaintiff the responsibility of the insurrection, and of the deviation, which, as it was the motive of the revolt, was also its direct and immediate consequence.

Where the loss arises from the inherent vices of the subject insured, the underwriters are not liable. See Pothier, *Contr. d’Assurance*, p. 105. Stypmannus, part 4, cap. 7, No. 310, p. 45; and Emerigon’s edition of Boulay Paty, vol. 1, p. 358. 1 Phillips on Ins. 627.

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In the present case, what was the "*vice pupre de la chose*." Considering the character of the slave, and the peculiar passions, which, generated by nature, are strengthened and stimulated by his condition, he is prone to revolt in the very nature of things, and ever ready to conquer his liberty where a probable chance presents itself. Hence the profound attention which the penal codes of all slave holding countries give to the police of the servile population. In our legislation, we find the most minute and careful details upon this subject, establishing a discipline rigorous indeed, but which no prudent citizen would desire to relax. With what reason can we distinguish this subject matter of insurance, and abstract it from the operation of the well established general principle which we have just invoked? Will any one deny that the bloody and disastrous insurrection of the Creole was the result of the inherent qualities of the slaves themselves, roused not only by their condition of servitude, but stimulated by the removal from their friends and homes, for the purpose of sale by their owners in an unknown land, and encouraged by the lax discipline of the vessel, the numerical weakness of the whites, and the proximity of a British province?

To escape this well established rule, the plaintiff's counsel have cited a decision rendered in 1778 by a tribunal in France, in the case of the brigantine *Le Comte d'Estaing*. The facts in that case are thus stated at length by Emerigon (Boulay Paty), *Cont. d'Assurance*, ch. 12, sec. 10:

"J'ai parlé du brigantin *Le Comte d'Estaing*, Capitaine Jean Jacques Olivier.

"Ce navire équipé de dix neuf hommes, arriva a la cote de Gambée, où le capitaine acheta dix neuf captifs. *Le contre maitre mourut*. On toucha à Gorée, où le *Capitaine Olivier et le maitre de l'équipage moururent*. César Gasqui, Capitaine en second, prit le commandement du brigantin, et se donna pour second Gaspar Benoit.

"On acheta encore quatorze captifs, ce qui fit en tout trente trois têtes, savoir: Onze nègres, quatre négresses, dix huit nègrillons ou negrites.

On se hata de quitter ce rivage funeste, *ou les fievres avaient saisi presque tout le reste de l'équipage*; on mit à la voile pour les îles Françaises. Pendant la route, les nègres se saisirent de l'entrepont, pénétrèrent dans la Sainte Barbe, d'où ils montèrent dans la chambre, s'y retranchèrent, se rendirent maitres des armes et firent feu; Gaspard Benoit fut tué; d'autres furent blessés. On se réfugia sur la dunette, et en avant du mât de misaine, où l'on resta pendant quatre jours, n'ayant pour tout aliment qu'une ancre d'eau-de vie. Le brigantin allait au gré du vent.

“ On aperçut au loin un navire. On mit pavillon en berne ; les signaux furent multipliés. Ce navire qui était le Senaut la Brunette, de Bordeaux, Capitaine Jean Malleville, s'avança ; Gasqui et ses gens s'y réfugièrent ; on laissa à bord un novice qui était malade, et un petit mousse que les nègres révoltés avaient retenu auprès d'eux.

La Senaut arriva à la Martinique, où le capitaine Gasqui fit son consulat.

Les nègres, délivrés de la présence de l'équipage Français, jouirent pendant quelque temps de la liberté pour laquelle ils avaient combattu. Le Brigantin courut une route incertaine. Il échoua sur les roches d'une des îles Caiques, où les nègres se réfugièrent. Un bateau Bermudien Anglais se trouvait sur les lieux. Le capitaine de ce bateau enleva tous les effets du brigantin, et mit feu au navire.

Les habitans des îles turques ayant appris que des nègres s'étaient réfugiés aux Caiques, y coururent ; ils se saisirent de sept nègres, dont le chef, pour échapper de nouveau à la servitude, se précipita dans la mer, où il trouva une mort volontaire : *Servitus malorum omnium postremum, non modo bello, sed morte etiam repellendum.* Cicéron, Philip. 2, cap. 44.

On prétend que les autres nègres et négresses périrent de misère. On ignore ce que devinrent le mousse et le novice.

La sieur Sales, propriétaire du brigantin et de la cargaison, fit abandon à ses assureurs, et présenta contre eux une requête en paiement des sommes assurées.

Les assureurs proposaient quatre moyens principaux de défense. J'ai parlé des deux premiers, supra, ch. 8, sect. 4. Ils disaient de plus, que l'accident était arrivé par la faute du Capitaine Gasqui et de l'équipage ; ils ajoutaient enfin que le sinistre procédait du vice propre de la chose.

L'assuré répondait : 1^o *Qu'on ne pourrait imputer aucune faute au capitaine ni aux mariniers : un équipage affaibli par la mort des principaux officiers et par les maladies, était hors d'état de contenir des nègres dans le devoir.* 2^{me}. Par vice propre de la chose, l'ordonnance entend la corruption physique qui corrode, gâte et détruit les marchandises proprement dites. Les mots déchet, diminution, empirance, dégât, déperdition, dont se servent les textes cités dans la section précédente, n'ont aucun rapport ni aux affections de l'âme, ni aux élans produits par l'amour de la liberté.

Quand on embarque des nègres, ce sont des ennemis qu'on embarque ; car, comme les ambassadeurs Scythes disaient à Alexandre, il n'y a jamais d'amitié entre le maître et l'esclave ; au milieu de la paix, le droit de la guerre subsiste toujours. *Inter dominum et servum nulla amicitia est ; etiam in pace, belli tamen jura servantur.* Quinte-Curce, lib. 7, cap. 8.

Les assureurs d'un navire qui va faire la traite des nègres savent qu'on y embarquera des ennemis qui, par leur fait, pourront occasionner la perte du bâtiment ; la révolte des nègres est donc *une fortune de mer*.

Sentence de notre amirauté, rendue en Mars, 1776, qui condamna les assureurs à payer au sieur Salles les sommes assurées. Arrêt du 13 Mai, 1778, qui confirma cette sentence.

Now there were circumstances in the case of the *Compte d'Estaing* which we look for in vain in the present case. The point is clearly supported by evidence, and is made by the assured, that the crew of the vessel had been weakened by the death of the principal officers, and by the debilitating effect upon the survivors of a disease engendered by the climate, and were thus incapacitated to keep the negroes in subjection. It is quite clear that the sickness was a peril of the sea, and as the reasons of the decision of the Court of Admiralty are not given, they may well have been influenced by that consideration, as well as by the position taken by the assured, that revolt was not comprehended under the general principle concerning losses arising from the qualities of the subject matter.

Certain it is that the logic in favor of the assured, as stated by Emerigon, is singularly inconsequent. "The insurers of a ship which is engaged in the slave trade know that she is to take on board enemies, who may, by their conduct, occasion the loss of the vessel. The revolt of negroes, then, is a peril of the sea, *une fortune de mer*." This is a very strange deduction from the premises ; so illogical in itself, and so inconsistent with a clear principle of insurance law, that Estrangin and Boulay Paty, whose opinions are entitled to high respect, express distinctly their disapproval.

The text of Pothier, p. 106, *Contrat d'Assurance*, who it will be observed, does not speak of the case of mutiny, is as follows :

"Suivant la même règle, si des voiles ou des cables sont usés de vétusté, l'assureur n'en est pas tenu, au lieu qu'il en serait tenu si c'était la violence des coups de vent qui en eût causé la rupture.

Suivant la même règle, lorsque des animaux ou des nègres sont morts de mort naturelle, où même lorsque des nègres par désespoir, se sont donné la mort, l'assureur n'en est pas tenu : car ce sont pertes arrivées par la nature, ou le vice de la chose, ou quelquefois par la négligence du maître, qui ne peut être imputée à l'assureur s'il ne s'en est chargé expressément. Autre chose serait s'ils étaient noyés *dans une tempête ou tués dans un combat*."

The note of Estrangin on this text is as follows :

"Je pense, comme Pothier, que l'assureur n'est pas tenu si les

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nègres se sont tués par désespoir. Valin, Ordon., 1681, Ass. Art. 11 et 15 ; et Emerigon, Ass. ch. 12, sect. 10, sont du même avis. Néanmoins ils tiennent que la révolte des nègres est à la charge des assureurs. Emerigon donne pour motif que ce sont des ennemis desquels on a pu prévoir qu'ils se révolteraient et que cet événement ayant lieu en mer, est à la charge des assureurs. On pourrait dire de même que les assureurs ont su qu'on embarquait des hommes susceptibles de se livrer au désespoir, et de se tuer pour se soustraire à l'esclavage et au traitement qu'ils éprouvent à bord.

Il me paraît que la révolte et le désespoir des nègres tenant au vice ou au caractère de la chose, doivent demeurer à la charge de l'assuré, à moins que les circonstances ne le fassent rapporter à quelque événement particulier.

"Ainsi Emerigon, à l'endroit cité, et ch. 8, sect. 4 et 5, rapporte un jugement qui dans un cas de révolte des nègres, mit l'événement à la charge des assureurs ; mais il y avait cette circonstance que l'équipage affaibli par des maladies contagieuses et réduit à peu de monde, n'avait pas pu se défendre contre les nègres, l'événement pourrait dès-lors être imputé à la maladie qui avait affaibli l'équipage, et qui prise en mer était un événement de mer ; mais s'il n'y a pas de circonstance particulière qui en fasse juger autrement, la révolte ne peut être attribuée qu'au vice de la chose, ou à ce que le capitaine n'a pas fait ce qu'il fallait pour la prévenir, ce qui, dans ce dernier cas, attribuerait l'événement à son fait ou à sa faute, dont l'assureur ne répond pas."

Boulay Paty, in commenting on the text of Emerigon and the decree of the French Court of Admiralty, thus expresses his opinion. Assur. ch. xii, sec. 10 :

"Si la traite des noirs n'était pas défendue par nos lois, nous penserions avec Pothier, Valin et Emerigon, que les assureurs ne sont pas responsables, lorsque des nègres, par désespoir se sont donné la mort. Ce sont pertes arrivées par la nature ou le vice de la chose, ou quelquefois par la négligence du maître, qui ne peut être imputée à l'assureur, s'il ne s'en est chargé expressément.

Mais nous dirions aussi avec M. Estrangin contre l'avis de ces trois auteurs, que la révolte des nègres à bord serait également perte arrivée par la nature ou le vice de la chose, ou quelquefois par la négligence du maître. La révolte, ainsi que la mort par désespoir l'tient aux affections de l'âme, et aux élans produits par le désir de se soustraire à l'esclavage. L'une et l'autre ont pour motif les mêmes causes, qui prennent naissance dans le caractère de la chose. (Voyez M. Estrangin sur Pothier, No. 66, des Assurances.)

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Cependant il pourrait y avoir des circonstances qui, comme celles de l'espèce de l'arrêt du 13 Mai, 1778, rapporté par Emerigon, mettraient la révolte des nègres à la charge des assureurs."

Let us add to the authority of these distinguished French commentators, the opinion of Lord Mansfield, the father of the law of insurance in England. The case is found in a note in 1 Durnford & East's Rep. vol. 1, p. 130. It was an action on a policy of insurance on slaves. The policy, as Lord Mansfield states, in his decision, was in the *common form*. But there was a memorandum on the policy, that "the assurers are not to pay any loss that may happen in boats during the voyage (mortality of negroes by natural death excepted): and not to pay for mortality by mutiny; unless the same amounts to ten per cent to be computed upon the first cost of the ship, outfit and cargo, valuing negroes so lost at £35 per head." The demand upon the policy was the loss of a great many slaves by mutiny. It was proved that some died from abstinence, some were killed outright, or received wounds, subsequently proving mortal, in the quelling of the mutiny, some died from the chagrin at their disappointment in the failure of the mutiny. The decision of Chief Justice Mansfield not only establishes that underwriters are not liable for those slaves who died by fasting or despondency, thus recognizing the doctrines of Pothier, Estrangin and Bouly Paty, etc., but covers fully the position for which we contend, that underwriters are not liable for losses by the mutiny or insurrection of the slaves, unless by the positive provisions of the policy they, the underwriters, have taken upon themselves that risk. Now, what says Lord Mansfield? We quote for greater certainty, his very words:

"I think the underwriters not answerable for the loss of the market or the price of it; that is a *remote* consequence, and not within any peril insured against by the policy.

"The question for the jury will be, whether any of those who died by any other means, except their being fired upon, or in consequence of the wounds and bruises which they received during the struggle, are within the meaning of that clause in the policy which insures against the damage by mutiny.

"It is not a law question. I know of no law on the subject; the jury must fix the rule, as the question arises upon a matter of fact. Some of them died in consequence of the insurrection failing; those certainly cannot be within the policy.

"*This policy is in the common form, and if it were not for the memorandum, I SHOULD SAY THAT THE CASE WAS NOT WITHIN THE INSTRUMENT.* But as it now stands, it is clear that those who were killed by the firing, or died in consequence of their bruises,

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are within the policy. The other complicated cases must be left to the jury.

"I shall endeavor to discriminate the different classes, and when the general rules for each are fixed, it will be easy for the jury to apply the particular instances.

1st. The first class certainly comes within the meaning of the policy, of *mortality* by mutiny: such as were killed in the affray.

2d. The second also comes within the same description; namely, those who died from the wounds they received from the firing and other hostilities.

3d. Another class is, I think, as clearly not within the policy. Such as, being baffled in their attempts, in despair chose a mode of death by fasting, or died through despondency. That is not a mortality by mutiny, but the reverse; for it is by failure of mutiny.

4th. The great class are such as received some hurt by the mutiny, but not mortal, and died afterwards of other causes, as those who swallowed water, jumped overboard, etc. This is the great point."

Verdict: That all the slaves who were killed in the mutiny or died of their wounds, were to be paid for.

That all those who died of their bruises which they received in the mutiny, though accompanied with other causes, were to be paid for.

That all who had swallowed salt water, or leaped into the sea, and hung upon the sides of the ship, without being otherwise bruised, or died of chagrin, were not to be paid for.

This decision is positive, that if the underwriters had not expressly made themselves liable for the mortality by mutiny, that is, for a loss by the direct and immediate consequences of mutiny, they would not have been bound.

Whether we recur to the principle expressly embodied in our law, that the master is responsible for the wrongdoing of his slaves, or to the principle of insurance law respecting the vices of the subject matter, and the weight of authority which applies this principle to the mutiny or revolt of slaves, we are alike brought to the clear conclusion that the assured must bear the loss thus incurred.

We have thus endeavored to show that the deviation is at the responsibility of the plaintiff; and we had already shown that a deviation exempts the underwriters from further responsibility.

The propriety of applying the rule is peculiarly obvious in the present case. We have seen that the law is so rigid on this subject, that a deviation has been repeatedly held fatal, although

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the risk was not thereby increased, but only changed so as to be no longer the identical risk. With how much greater force does the rule apply to the present case, where the object and the consequence of the deviation was the carrying the vessel at once to the shores of a British province, and exposing her to interference of British power, the risk against which the underwriters undertook to indemnify, in case the exposure thereto should take place by those fortuitous events, those perils of the sea, and those alone which are comprehended in the policy.

VI. It has been contended that the insurrection was only the remote, and that British interference was the proximate cause of the loss. It will hereafter be shown that the slaves were not lost by "foreign interference," the risk expressly assumed by the underwriters; that, on the contrary, if the policy was not extinguished by the insurrection and deviation, still the slaves *voluntarily* left the vessel at Nassau, thus accomplishing the sole object of their going there, and that the underwriters are protected by the clause that the company is not liable for "elopement." What is the standard by which to test the cause of a loss?

The case of *Vallejo v. Wheeler*, Cowper's Reports, p. 143, was an action on a policy of insurance upon goods on board the Thomas and Matthew, from London to Seville. The policy was in the common form, and contained a clause to indemnify against barratry of the master. On the trial, it was proved that this ship was put up as a general ship from London to Seville, and was let to freight by one Darwin, who chartered her to Brown, the captain. That it is the course of vessels going on this voyage to stop at some port in the west of Cornwall, to take in provisions. That this ship having taken her cargo on board, sailed from London to the Downs; while she lay there, all the other ships bound to the westward bore away; but she staid till the night after, and then sailed to Guernsey, which was *out* of the *course* of the voyage. That the captain went there for his own convenience, to take in brandy and wine on his own account: after which he intended to proceed to Cornwall. That the night after the ship quitted Guernsey, she sprang a leak, which obliged her to put into Dartmouth.

When she was refitted she set sail again, and proceeded for Helford, in Cornwall, where it was always intended she should stop to take in provisions; but on her way she received further damage, and, on her arrival, was totally incapable of proceeding on her voyage, and the goods were much damaged.

"Lord Mansfield.—The question then is, what is the ground of complaint against the master? He had agreed to go on a voyage from London to Seville; Darwin trusts he will set out immediately; instead of which the master goes on an iniquitous

scheme, totally distinct from the purpose of the voyage to Seville; that is a cheat and a fraud on Darwin, who thought he would set out directly; and whether the loss happened in the act of barratry, that is, during the fraudulent voyage or after, is immaterial; because the voyage is equally altered, even though there is no iniquitous intent. But, in the present case, there is a great deal of reason to say, *that the loss was sustained in consequence of the alteration of the voyage. The moment the ship was carried from its right course, it was barratry; and here the loss was immediately upon it. Suppose the ship had been lost AFTERWARDS, what would have been the case of the insured, if not secured against the barratry of the master? He would have lost his insurance, by the fraud of the master; for it was clearly a deviation, and the insured cannot come on the underwriters for a loss in consequence of a deviation.* Therefore, I am clearly of opinion, this smuggling voyage was barratry in the master.

“Willes, Justice, concurred.—The only doubt I had in this case was, when the loss accrued; and I think it may reasonably be said to *have happened in consequence of the smuggling voyage; for if the ship had proceeded on her first intended course, she would have escaped the storm.* Though this was a deviation, yet it is a just and fair rebutter to say, that it was barratry in the master, which is insured against in the policy. I think the justice of the case is on the side of the plaintiffs, and, therefore, that there ought not to be a new trial.”

This case is quite in point, and more particularly for this reason; barratry of the master is a risk for which the underwriters are not liable, except by special declaration in the policy, and hence almost all policies now especially include that risk. Barratry then, if not especially provided for in the policies, would stand on the same footing as a loss from the vice of the thing, *le vice propre de la chose*, for which the underwriters are not bound, unless they expressly assume it.* Apply then the language of Lord Mansfield, substituting the word insurrection for barratry, and how would this decision stand in a case where the underwriters had expressly assumed the risk of insurrection?

* To show how entirely barratry and the vices of the thing stand on the same footing, take the recent Code of Spain, made in 1829, where the two are found in immediate juxtaposition. “No son de cuenta de los aseguradores los danos que sobrevengan por alguna de las causas siguientes.” After citing deviation, voluntary separation from convoy, going to a different port, the Code proceeds—“Baraterias del capitan o del equipage, no habiendo pacto espreso en contrario—Mermas, desperdicios y pérdidas que procedieren del vicio propio de las cosas aseguradas, como no se hubieren comprendido en la poliza por clausula especial.—Codigo de Comercio, p. 363, Madrid edition.

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“Suppose the ship had been lost *afterwards*, what would have been the case of the insured if not secured against the insurrection of the slaves? He would have lost his insurance by ‘the insurrection of the slaves and altering the ship’s course.’ For it was clearly a deviation; and the insured cannot come on *the underwriters for a loss in consequence of a deviation.*”

Make the same substitution of words in the opinion of Justice Willes. “The only doubt I had in this case was, *when the loss accrued*; and I think it may be reasonably said to have happened in consequence of the ‘insurrection of the slaves, and their carrying the vessel to Nassau’; for if the ship had proceeded on her first intended course ‘to New Orleans, she would have escaped the British emancipation.’”

In *Schieffelin v. The New York Insurance Company*, 9 Johnson, p. 26, Kent, C. J., says: “Suppose the policy was against capture only, and the vessel was captured, and then shipwrecked while in the hands of the captor; I should think the assured would have a right to abandon, and to maintain that his right to recover, as a total loss, attached upon the capture; and that the subsequent casualty was one with which he had no concern.”

Now apply this opinion to the present case. Suppose that here the underwriters had expressly assured against insurrection, and had not made themselves liable for “risks of emancipation, seizure or detention of foreign powers,” and suppose the slaves having risen and taken possession of the vessel, as they did, and carried her to Nassau, were there all seized by the British government; what would be the position of the assured upon such a policy, and under such facts? Why, in the language of Kent, the assured would have a right to abandon, and to maintain that his right to recover, as for a total loss, attached upon the insurrection and the seizure of the vessel by the slaves; and that the subsequent casualty was one with which he had no concern. Now here the parties occupy exactly the reverse of the position in the supposed case. The mutiny here is at the risk of the assured; the foreign seizure at the risk of the underwriters; but the mere change of position does not change the law. The same rule must apply to both. There cannot be one rule for underwriters, and another rule, in the same supposed case, for owners.

Again in *McGowan v. The New England Insurance Company*, the vessel was seized and detained by a foreign power, and subsequently restored; but, when restored, it was found, from her long exposure to the weather in a hot climate, in an open roadstead, that her hull, sails and rigging were so much injured, that she could not, without very great repairs, be enabled to perform.

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the voyage, and that the repairs would cost more than the vessel was worth. Under the circumstances, the master refused to receive her back without indemnity by the foreign power, and abandoned her; and his owners, as soon as they received the information, abandoned her to the underwriters. Now, the policy covered the capture and seizure, but did not cover a destruction by the effect of the climate.

The question, among others, on which the liability of the underwriters turned, was to what cause was the loss legally attributable? whether to the seizure, or to the effects of the climate. The plaintiffs contended that the seizure was the cause, and that it was the immediate cause, though not the active agent in the destruction. Story thus disposes of the question (Story's Rep. vol. 1, p. 164):

"The first question which arises in the present case, is, whether there has been a total loss in the sense of the law of insurance? It is clear there has been no loss by the perils of the seas, but there has been a restraint and detainment of the government, within the words of the policy. Has there been a total loss by reason of that restraint and detainment? I think there has been. The argument is, that the injury to the vessel, by the long delay and exposure to the climate, was the immediate cause of the loss, and the seizure and detainment the remote cause only; and that, therefore, the rule applies—*causa proxima, non remota, spectatur*; and the underwriters are not liable for injury by mere wear and tear, or by delays in the voyage, or by worms, or by exposure to the climate. But it appears to me that this is not a correct exposition of the rule. All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. If there be a capture, and before the vessel is delivered from that peril, she is afterwards lost by fire, or accident, or negligence of the captors, I take it to be clear, that the whole loss is properly attributable to the capture. It would be an over refinement and metaphysical subtlety to hold otherwise; and would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils."

So in *Potter v. Ocean Insurance Company*, 3 Sumner, 41, Judge Story remarks:

"In relation to the next point of objection, as to the payment for the loss of the boat, it seems to me to be disposed of by the verdict of the jury. They have found that it was a direct consequence attributable to the preceding storm; so that the principle, in case of loss, that, *causa proxima, non remota, spectatur*, is not at all interfered with. If the bark has become wholly un-

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manageable and innavigable from the immediate effects of the storm, I do not well see how the direct result from unmanageableness and innavigability, are to be treated otherwise than as a part of the loss. The storm is still the *causa proxima*. In causes of this sort it will not do to refine too much upon metaphysical subtleties. If a vessel is insured against fire only, and is burnt to the water's edge, and then fills with water and sinks, it would be difficult in common sense to attribute the loss to any other proximate cause than the fire, and yet the water was the principal cause of the submersion. If a vessel be insured against barratry of the master and crew, and they fraudulently bore holes in her bottom, and thereby she sinks, in one sense she sinks from the flowing in of the water; but, in a just sense, the proximate cause is the barratrous boring of the holes in her bottom."

In the case of *Hahn v. Corbett*, 2 Bingham, p. 205, the insurance was on goods in a ship, *warranted by the assured free from capture and seizure*. The ship was stranded on a shoal within a few miles of the port of destination, disabled from proceeding, and lost; but while she lay in the sand, she was seized by the commander of the place at which she was stranded, and the goods were confiscated by him. This was held a loss by the perils of the seas. Park, Justice, thus treats the case:

"I thought at first that the plaintiff could not recover, but I am now convinced of the contrary, and the confusion has been occasioned by the way in which the case is stated. But, in fact, the vessel and cargo were wrecked, and a total loss incurred before the enemy interfered. Not a twentieth part of the cargo remained undamaged, and there were no means of carrying it on. Supposing the goods had been sunk, the assured would have been entitled to recover for a total loss; and if they had afterwards been fished up by the enemy, would that have made any difference? Assuredly not. In *Bondrell v. Hentigg*, 1 Holt, N. P. C. 149, an action on a policy of insurance on goods, the vessel was wrecked, and part of the goods were lost and part were got on shore, but whilst on shore they were destroyed and plundered by the inhabitants of the coast, so that no portion of them came again into the possession of the assured; it was holden, that this was a loss by the perils of the sea, and that no abandonment was necessary. If we change 'enemy' for 'inhabitants,' that case is not unlike the present, in which our judgment must be for the plaintiff."

The court will have no difficulty, if the above decisions are entitled to any weight, in coming to the conclusion, that the voyage was gone, and all recourse under the policy lost, when the slaves took possession of the vessel, and changed her destination,

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It has been well observed by Judge Story, "that if there be any commercial contract, which more than any other requires the application of sound common sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance; for it deals with the business and interest of common men, who are unused to deal with abstractions and refined distinctions." Let us take then a practical view of this case, and ask whether these underwriters, by any clause or expression contained in their contract, can be considered as agreeing that they should be liable, if this vessel should by an insurrection of the negroes themselves, thus crowded in this unreasonable number in a vessel of such a size and unrestrained by suitable precautions and discipline, be wrested from the control of the captain and crew, and carried into a British province? Did they contemplate any other exposure to foreign interference than such as should result from the vessel being captured on the high seas, or driven by the violence of the winds and waves or other external force upon the shores of a country hostile to the institution of slavery? But one reply can be made to this enquiry.

VII. The plaintiff has attempted to class this loss as a loss by piracy—the slaves, says he, were pirates. It might suffice to say, that piracy implies the *animus furandi*, and that these slaves were instigated, not by the thirst for plunder, but by the mere desire of liberty. But these disquisitions are of little moment. The question is, what piracy the policy contemplated, and what loss did it intend to cover? The natural answer is—external attack and the carrying off of the slaves by pirates, not the case of the subject matter of the insurance itself assuming a piratical character.

VIII. If, however, the court shall be of opinion that no one of the grounds of defence hitherto assumed is tenable, and that the slaves were not lost to the assured on their arrival at Nassau, but were still covered by the policy, it becomes necessary to enquire into the occurrences at Nassau, and to examine the question, whether the loss of the slaves is to be attributed to the "foreign interference," for which the defendants would be liable under the policy, or to the "elopement" of the slaves, which cause of loss was expressly assumed by the plaintiff.

Without going into a detailed examination of the testimony, we take it to be incontrovertible that, from the moment the vessel's head was turned towards Nassau instead of New Orleans, till her arrival at Nassau, she was under the undisputed control of the blacks. This fact results from the testimony of the plaintiff's witnesses, and is not understood to be denied by counsel; but it was seriously contended in argument, that the muti-

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ny had *ceased*, prior to the vessel's having any communication with any persons at Nassau. If by the word *ceased*, it is meant that there was no longer any contest between the whites and blacks, and that all was quiet on board, the fact is unquestionable. The mutiny had *ceased*, because it had been completely successful, because the whites had ceased to struggle against the revolt of the blacks, and had become the *captives* of the blacks, so much so, that by their own confession, they considered their lives as completely at the mercy of the blacks, and to use their own language, "had abandoned all hope of ever setting foot on shore." But if by the expression that the mutiny had *ceased*, plaintiff intends that it had been *quelled*, and that the whites had succeeded in recovering control over the negroes, and reducing them to subjection before a British guard had been sent on board, the position is borne down by the weight of the entire testimony of the witnesses on both sides, and this too in a manner so conclusive, that we should scarcely deem it necessary to notice the point, had it not been strenuously urged by the very respectable counsel who appear for the plaintiff. Leaving out of view the concurrent testimony of all defendants' witnesses, let us see what is the state of the case, according to the evidence produced by the plaintiff. After the pilot had got the vessel into the harbor, Gifford says: "As the pilot was bringing the vessel to in the harbor, the quarantine officer came alongside in his boat. Deponent jumped into his boat, and told him the cause of our coming in there, and asked him to put deponent on shore, and to watch the vessel, and to let them have no communication with the shore till he returned. He then accompanied deponent to the American Consul. The officer watched the vessel, and deponent and the Consul went to see the Governor of Nassau, and saw him at his house, and stated the case to him. The Consul then asked protection to guard the vessel till something could be done. The Consul asked him, if he would send some soldiers on board to guard the vessel, cargo and passengers, and crew, till something could be done, which was done."

It was only after the British guard came on board that any semblance of control over the blacks was resumed. Gifford goes on to say, that "the officer in command was Capt. Mins. These soldiers, when they came on board, put the men forward and the women aft. They then tied Ben Blacksmith, Madison Washington, D. Ruffin and Elijah Morris, and confined them in the long boat on deck, where they were kept till the slaves were liberated."

How happened it, if the mutiny was quelled, and the slaves recovered prior to the appearance of a British force on board, that the leaders of the mutiny were left at liberty, and that the

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first step towards getting control of the ship, viz., the confining of the chiefs of the insurgents, was taken by the British soldiers sent on board at the Consul's request?

But see the testimony of this witness for the plaintiff, "that on the day they arrived at Nassau, Captain Woodside came on board with the American Consul. *He offered to assist in taking charge of the vessel, AND TO HELP TO MASTER THE SLAVES.*" "It was intended, *whenever the nineteen slaves should be taken out of the brig*, that witness and the aid he was to receive, should take possession of the brig and remaining slaves, and bring them to Indian Key, *for which purpose their force would have been sufficient.*"

Again, the same witness says: "The negroes had no arms at Nassau, (they had been thrown overboard,) and *might have been easily overcome,*" etc. So they were not overcome, but *might* have been.

The testimony of Captain Ensor, Stevens, the second mate, and Lieut. Mends, who was the officer first sent on board with the guard, corroborates the evidence of Gifford on this point.

Assuming, then, as a fact, that on the arrival of the vessel at Nassau, the blacks on board were fugitive slaves, who had succeeded in overpowering their masters, and in escaping into the jurisdiction of a foreign power, by whose laws slavery is not tolerated, we will next examine what was the effect of this state of things by the law of nations, and what were the obligations which either the law of nations or the comity of nations imposed on the British authorities, and whether the slaves acquired their freedom in Nassau by reason of "the foreign interference," the risk assumed by the underwriters, or by the force and effect of the law of nature and of nations on the relations of the parties, against which no insurance was or could be legally made.

Slavery is against the law of nature; and although sanctioned by the law of nations, it is so sanctioned as a local or municipal institution, of binding force within the limits of the nation that chooses to establish it, and on the vessels of such nation on the high seas, but as having no force or binding effect beyond the jurisdiction of such nation.

The position, that slavery is a contravention of the law of nature, is established by the concurrent authority of writers on national law, and of adjudications of courts of justice, from the era of Justinian to the present day.

What is the very definition of slavery, as given in the Institutes, Lib. 1. Tit. 3, sec. 2?

"*Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subicitur.*"

See also Burlamaqui, vol. 2, p. 297, 302-3-4. Puffendorff,

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book 3, chap. 2, sec. 5. Story's Conflict of Laws, sec. 96 ; and the cases of *Lunsford v. Coquillon*, 2 Mart. N. S. 401 ; *Marie Louise v. Marot*, 9 La. 473. *The Antelope*, 10 Wheaton, 120. *Commonwealth v. Aves*, 18 Pickering, 193. *Forbes v. Cochrane*, 2 Barnewell and Cresswell, 448. *The slave Grace*, 2 Haggard's Adm. Rep. 94.

This view of the principles of the law of nations in respect to the institution of slavery is supported by an implication of the strongest character, derived from the Constitution of the United States. These States being about to be united in one great confederacy for the common interest of all, provisions were made for drawing the ties which bound them together more closely than those which unite independent states under the law of nations. The second section of the fourth article of the Constitution contains three distinct clauses, each intended to promote this object. The first provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. This clause was necessary ; without it, under the law of nations, each State might have refused such privileges to the citizens of other States. By the second clause, the extradition of fugitives was rendered imperative on each State when demanded by a sister State. This clause was necessary : without it, under the law of nations, each State might have refused extradition. By the third clause, the emancipation of fugitive slaves is forbidden, and their restoration to their owners required. This clause was also necessary : without it, under the law of nations, each State might have declared such fugitive slaves to be free, and have forbidden their restitution to their former owners. When we examine the language of the constitution, the juxtaposition of this clause to the two preceeding ones, the three clauses forming together a distinct section of the constitution, the implication is irresistible, that the eminent statesmen who represented Southern interests and Southern institutions in the convention that framed that instrument, were convinced that by national law the fugitives from slavery in the Southern States would acquire freedom by escaping into the Northern States, and that a provision, in the nature of a treaty stipulation to the contrary, was indispensable to the protection of Southern rights. Indeed the principles for which we contend in this branch of the argument are fully and freely admitted to be correct by our own government, in its diplomatic correspondence on this subject. Mr. Webster, in his letter to Lord Ashburton, on the 1st August, 1842, says explicitly: "*If slaves, the property of citizens of the United States, escape into the British territories, it is not expected that they will be restored. In that case, the territorial juris-*

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diction of England will have become exclusive over them, and must decide their condition." It is true that he goes on to say, "but slaves on board of American vessels lying in British waters, are not within the exclusive jurisdiction of England, or under the exclusive operation of English law, and this forms the broad distinction between the cases." We shall examine hereafter the force of the exception here laid down, and continue our quotation of the paragraph. "If persons guilty of crimes in the United States, seek an asylum in the British dominions, they will not be demanded until provision for such cases be made by treaty; because the giving up of criminal fugitives from justice, is agreed and understood to be a matter in which every nation regulates its conduct according to its own discretion. It is no breach of comity to refuse such surrender."

This letter of Mr. Webster was the last of a long series of official communications from this government to that of Great Britain, growing out of certain outrages committed by the latter on our commerce. In the cases of the *Hermosa*, the *Comet*, the *Encomium* and the *Enterprise*, American vessels, sailing under the American flag, from one American port to another, on lawful voyages, had been driven by stress of weather to take refuge in a British port, and British authorities had asserted and acted under the monstrous pretension that they were entitled to enter such vessels, to examine into the nature and character of the cargo, to investigate the personal relations of those on board, and by active interference to set free slaves, the property of American citizens, thus thrown by unavoidable necessity into their power. Such pretensions were met by a universal burst of indignation from those whose rights were so lawlessly invaded, and, if persisted in, would have unquestionably afforded the justest cause of war to this nation. In a series of letters from American Secretaries of State and American Ministers at the Court of St. James, the absurdity of these pretensions, the utter absence of all basis for them in the law of nations, were demonstrated with signal ability. In Mr. Forsyth's letter of instructions to Mr. Stevenson, under date of 27th March, 1837, and in Mr. Stevenson's letter, embodying these instructions, and addressed to Lord Palmerston, on the 12th May, 1837, the doctrines asserted by the American government are enforced by a weight of argument and cogency of reasoning, perfectly irresistible.

But admitting, as we do, to their fullest extent these doctrines, we deny their application to the case of the *Creole*, and it is impossible not to perceive the marked distinction between this case and that of the other vessels. Indeed the very reasoning employed by the American diplomatists in their correspond-

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ence relative to the *Hermosa*, *Comet*, etc. when applied to the case of the *Creole*, leads to exactly the opposite result. The *Creole* reached the port of Nassau, a port of a power by whose laws slavery is not tolerated, in the possession of black persons, masters of their own movements, under no physical control, who had succeeded by force of arms in overpowering their owners, and were seeking a refuge from slavery. All the other cases were those of American citizens, with their slaves under their control, and in their peaceable possession, in American ships, driven by stress of weather to seek hospitality in British waters. In the case of the *Creole*, the blacks brought the whites captive into Nassau, on board of a vessel captured in a successful revolt. In all the other cases, the whites brought submissive slaves into Nassau on their own vessels. What was the complaint made by this government, as regards these latter cases? It said to Great Britain: you have no right to enter those vessels, and to examine into the relations of the persons on board. You are bound to leave them as you find them; to afford the hospitality of your ports to those who enter in time of peace; and you are not permitted to interfere and to set the blacks at liberty; they are our property: leave them untouched. See the letters of Mr. Forsyth and Mr. Stevenson, above referred to.

But we are asked in accents of indignation, can it be pretended that the situation of the blacks who reached Nassau in the *Creole*, after committing the most atrocious crimes, is better and more advantageous than that of those who reached there in due and proper submission to their owners? Can crime confer immunities and privileges? To this we answer, that the freedom of those who reached Nassau in the *Creole* was acquired, not by *reason*, but in *spite of* the commission of the crimes. The freedom was acquired by their *escape* from slavery into a free country. The *means* of escape cannot affect the consequences resulting from it. If a slave eludes the vigilance of his owner and escapes into a free country, he becomes free. If, whilst effecting his escape, he is discovered and impeded in his flight, and overcome the impediment by violence, the result is the same. In neither case can he be reclaimed. If that violence proceeds to the extreme of murdering his master, the crime is one for which he may be demanded from the nation into whose dominion he escapes. If there be a treaty stipulation, his extradition may be required as a right; if not, it may be asked as a favor; but, in the language of Mr Webster, may be refused without a breach of comity. Such treaty stipulations now exist between this country and Great Britain; but, at the date of the entry of the *Creole* into the harbor of Nassau, they did not exist.

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View this matter as we may, it at last resolves itself into this simple question: does the law of nations make it the duty of Great Britain to refuse a refuge in her dominions to fugitives from this country, whether black or white, free or slaves? It would require great hardihood to maintain the affirmative as to whites; but the color of the fugitive can make no possible difference. It will scarcely be pretended that the presumption of our municipal law that blacks are slaves, is to be made a rule of the law of nations; and, if not, in what manner are the British authorities to determine between the blacks and whites reaching their ports on the same vessel, the former asserting their liberty, and the latter denying the fact, and claiming the blacks as slaves? It is obvious that the only criterion by which they can properly be governed, is that which is insisted on by the American Government, viz: not to inquire into the relations of the parties as they previously existed; if the blacks reach there under the control of the whites, and as their slaves, so to consider them; but if the blacks reach there uncontrolled by any master, and apparently released from any restraint on the part of the whites, to consider them as free.

These being the principles on which, by the law of nations, Great Britain has the right to regulate her conduct towards fugitives from this country, let us inquire into the occurrences at Nassau. It is not our intention to enter into a minute examination of the contradictory statements of witnesses, many of whom labor under an evident bias, but to show by the official correspondence, that the action of the British authorities afforded no ground for any just complaint; that the only interference on their part was that which was solicited by the representative of our government, and that the acquisition of liberty by the slaves, and consequent loss to the owners, resulted not from "interference by the British authorities," but from their escape from their masters, and the operation of the law of nations, acting on the relations of the parties.

It is admitted by all, even by the plaintiff's witnesses, that none of the authorities at Nassau interfered in the slightest degree with the persons on board of the *Creole*, till a request to that effect was made by the American Consul. See the official correspondence, *ante* p. 234—9.

This correspondence has been made the subject of a great deal of comment, and the third clause of the decision of the Governor and Council as to the course they would pursue, has been denounced as an active interference to set at liberty persons who reached their jurisdiction in the condition of slaves. But it would be difficult for any person whose interests are not involved in this controversy, to misunderstand what occurred,

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or to find in it cause of complaint, when the facts are borne in mind.

The blacks arrived under no restraint. Nothing, except an interference of some external force could prevent their immediate landing. In this emergency the Consul visits the Governor. He knew, as he states himself, that any request to the Governor to use force to prevent the blacks from coming on shore, or to aid the whites in regaining mastery over them, would be to request the Governor to violate the law of nations, and the laws of his own country. He accordingly makes no such request; but confines his demand to the detaining of the slaves *until an investigation can be had*. Now the Governor might have refused this request *in toto*, and the whole matter would have been ended by the tranquil landing of the blacks. Their liberty would thus have been secured according to any possible view of the law on this subject, and without a pretext for asserting an interference by the British government. The Governor was, however, willing to do what the Consul requested, so far as he could without a violation of his duty, without disobedience to the laws of his country. He accordingly says to the Consul, that, "*for the fulfilment of the object of your letter,*" a guard has been sent on board. But to avoid all possible misunderstanding, he again says to him in writing how far he can go. He declares first, that the courts of law there had no jurisdiction. This certainly was no interference. The Governor and Council may have been mistaken in this opinion, as plaintiff contends that they were. If so, it only evinces more thoroughly their solicitude to avoid all action in the matter, and surely does not amount to an emancipation of the slaves, against which we insured. The second point is, although, by the law of nations, we are not bound to interfere in the question of the guilt of these blacks, nor to deliver them up, yet, at your request, and in the absence of instructions from our government, we will so far interfere as to send a guard on board to prevent the landing of any of the blacks *until an investigation is had*, and we will then confine the guilty, so as to prevent their escape, until we shall be instructed by our government whether it chooses to give them up, because, on this point, our government is at perfect liberty to say yes or no, without infringing even the comity of nations. The third point is, if you use our guard as you request, only *until an investigation is made*, then the blacks must be released from further restraint; that is to say, you are not to obtain the use of our forces under pretext of conducting an investigation, but with the real view of keeping the blacks on board until you can collect strength to master them; because, if our forces are to be used in the fur-

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therance of such object, we should be violating the laws of our own land.

We find that things were conducted in accordance with this understanding, fully acquiesced in by the American Consul ; for he utters not a syllable of dissent from that time till Friday, the 12th, when he complains, in a note to the Governor, that parties from the shore were about to board the Creole by force, to which the Governor answers, that, if such attempt be made, *he shall be quite ready to use every authorised means to prevent it.* His next communication is on the 14th, in which he complains that all the slaves on board the brig were liberated and put on shore by the Attorney-General, and those accompanying him.

We shall not detain the court by entering into a minute examination of the remaining evidence, showing the circumstances under which the blacks went on shore. The evidence of the witnesses on the two sides is quite contradictory. That of the plaintiff could easily be shown to abound in contradictions and exaggerations. The court will notice that the fourth decision made by the Governor and Council, on the 9th November, was "that a detailed account of what had taken place should be sent to the British minister at Washington." Accordingly, it appears, that the Attorney General, who conducted the investigation, was directed to report his proceedings to the Governor. This report is to be found in the Consul's deposition, (*ante* p.238), under date of the 13th November, and is referred to the Governor's reply on the 15th, to the Consul's letter of the 14th. It is true that one or two of the counsel for plaintiff have insinuated that this report was ante-dated, and was connected *after* the Governor's receipt of the Consul's letter of the 14th. We can make no reply to these insinuations, and may well leave it to the court to say whether they will listen for an instant to imputations so degrading against gentlemen in high and responsible official station, without a title of proof on which to sustain them.

But the main reliance of the plaintiff, as to the facts on this part of the case, is the circumstance that, on the organisation of an enterprise, by the American Consul with Captain Woodside and some other American seamen in the port, to board the Creole, and subdue the negroes by force of arms, the British authorities interfered to prevent the accomplishment of this object.

Leaving out of view the fact that this armed expedition of the Consul was directed against a vessel then occupied by an armed guard of British soldiers, placed there at his *own request*—losing sight for the moment of the agreement, fairly entered in—

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to between the British authorities and the American Consul, that the guards were to be used only *until an investigation could take place*—and the obvious implied understanding that British force was not to be decoyed on board, under the pretext of employing them to guard the vessel whilst the examination was going on, but with the real object of being there as a means of preventing the landing of the blacks until measures could be taken for their subjugation, let us calmly consider whether under any fair construction of the duties and legal obligations imposed on the local authorities, they could have acted otherwise, even if slavery had existed in Nassau, as a legal municipal institution.

A vessel was lying within the jurisdiction of Great Britain, in a time of profound peace; lying within a harbor where the jurisdiction of that power, according to the law of nations, was exclusive; lying, according to Gifford's testimony, within 150 yards of the wharf. Now whether the blacks on board of the *Creole* were free or slaves, was a question of law; and this too, whether Nassau was subject to laws recognizing or repudiating the existence of slavery. Will the proposition bear examination for a moment, that the local authorities were bound to look on quietly and see this question determined by a resort to arms? Were the magistrates of the land to remain quiet spectators of a conflict going on in a peaceful harbor, within a stone's throw of the wharf, in which blood was to be spilt, and life to be sacrificed in determining what were the legal relations of parties? Such a state of things in a civilized country, in the nineteenth century, could not for an instant be tolerated; and would not be tolerated in this country, nor in the port of New Orleans. It is too monstrous to be thought of.

Once more we repeat, that the fact that the insurgents on the *Creole* were blacks can make no difference in principle. The presumption of slavery arising from color is one confined to our municipal law, and makes no part of the law of nations. Even under our municipal law, it may be rebutted. In point of fact, there are vast numbers of free blacks in the United States; and, if the black population of the world be taken in view, the vast majority are freemen. Whether the blacks on the *Creole* were free or slaves, was a question to be decided by the law alone, if the blacks asserted their freedom, and by no possible construction of defendants' liability can they be held responsible for a refusal by the British authorities to permit the question to be decided by battle.

Peyton and I. W. Smith, contra.

I. As to the question of seaworthiness. The presumption

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is in favor of the seaworthiness of the vessel, in all cases where the plaintiff does not, by his testimony, trace the loss to a source beyond the perils covered by the policy, and show that its direct and proximate cause is some specified fact, which, from the usages of the trade in which the vessel is engaged, or the general rules of navigation, constitutes, *per se*, an unworthy condition of the vessel.

The defendants aver the unseaworthiness of the brig for the want of arms, and for want of precaution in embarking the slaves; and because the brig, it is said, was of too small dimensions for the number of slaves on board.

They place their objection wholly on the peculiar nature of the property insured.

In alleging unseaworthiness on grounds peculiar to the nature of the property insured, the defendants present three subjects of inquiry, viz:

1st. By the usages of trade, were arms necessary on such a voyage, or was a larger vessel required?

2d. Were arms or a larger vessel required by the nature of the voyage, and contrary to the usage?

3d. Do the plaintiffs warrant the seaworthiness of the brig, after the commencement of the voyage?

The first question is one of fact to be decided by evidence. The defendants adduced no evidence on their part, and are therefore obliged to rely wholly upon the evidence of the plaintiff. Our evidence so far from making the objection valid, totally destroys it.

The testimony shows, that so far from a violation of any of the usages of vessels bringing slaves from Richmond to New Orleans being proved, there was a strict compliance on the part of the Creole with every usage; that the crew was more numerous than is usual; that the vessel had been engaged in the business ever since she was constructed; that she had safely brought out, on a previous voyage, fifteen more slaves than were shipped on the present voyage; that the slaves as they came on board, were peaceable and obedient; that every precaution ever used, was employed; and that, in every respect, the brig was fitted for carrying the slaves.

But we are told, the act of Congress regulating the number of passengers, from a foreign country, according to the tonnage of the vessel, is applicable to this case. Yet that law expressly applies only to voyages from a foreign country, and leaves vessels making voyages coastwise to carry as many passengers as they choose. Thus the analogy, if any there is, is in our favor, by the very omission to make a rule for coastwise voyages!

As to the second question, the fact that four passengers, and

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the captain's wife, niece and child, unhesitatingly entrusted themselves on board the brig, is stronger than the testimony of witnesses. If arms were necessary, or if the vessel was not sufficiently capacious for the slaves, would these persons have exposed themselves on her?

Here we have the evidence of seven disinterested persons, given in a manner stronger than upon oath—by entrusting their lives on a sea voyage, with a full knowledge of the equipments and capacity of the vessel for that voyage!

The officers and crew also readily embarked on the voyage, without requiring additional precautions, or objecting to the number of the slaves.

As to the third question, the rule which holds the owner of the cargo to warrant the seaworthiness of the vessel, has, thus far in the history of insurance, only been applied to the state of facts at the moment of the departure of the vessel on the voyage insured.

Any subsequent unseaworthiness is at the charge, and upon the responsibility of the underwriter. It is one of the perils of the sea.

II. III. IV. The counsel for the defendants contend, that the clause as to insurrection in the Orleans Company's policy is a warranty, and that the events of Sunday night and the next day put an end to the contract; and that those events, though the clause be considered as creating an excepted risk only, broke up the voyage insured, and thus relieved the insurers from further liability.

Finally, they say, that considering the words employed in the policy, the insurrection must be taken as the direct cause of the loss of the slaves.

McCargo took out a policy on twenty-six slaves, valued at \$800 each, or \$20,800 in the whole, from Norfolk to New Orleans, for the premium of two per cent. Besides the usual risks of piracy, thieves, taking at sea. &c., as expressed in the printed part of his policy, these written clauses were inserted: "This policy covers all risks, and provides chiefly against that of foreign interference." "But warranted by the assured free from elopement, insurrection and natural death."

It is contended that these words formed one of the conditions precedent of the policy, which, not being complied with during the voyage, the contract would, from that moment, be annulled.

In the technical language of insurance law, the word warranty is used in a double sense—sometimes to denote a condition precedent of the contract, and at other times a risk excepted by the insurer.

As a condition precedent, warranty is either implied or ex-

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pressed; as a risk, it is always expressed. As a condition, it consists of a circumstance which the law, if the warranty is implied, and the parties, if expressed, consider as barely relating to the risks of the policy; but not as having any necessary connexion with the loss of the property insured, nor as being in any manner material thereto. As an exception, it is regarded in itself as a substantive cause of loss. As a condition, not being complied with, there is an end to the contract; as an exception, it does not affect the policy, unless it is the immediate and necessary cause of the loss. 1 Phillips, 346, 555. Condry's Marshall, 346.

It is said by Marshall, that "the warranty makes the contract hypothetical; that is, *it shall be binding, if the warranty is complied with.*" Vol. 1, p. 348.

The proper nature of a warranty, is well stated by Mr. Justice Washington, in *Calbreath v. Gracy*, 1 Washington's C. C. R. 222. "What is a warranty? It is an agreement by the assured, in the nature of a condition precedent, which must be strictly and literally performed, before the assured can recover. It is of no consequence *whether it be material to the risk or not*; and it is equally unimportant to what cause the non-compliance with it is attributable."

Insurrection is itself a risk or cause of loss, not simply a circumstance relating to a risk; and thus, from its nature, should much rather be considered as a risk excepted, than a condition of the policy. It is usually regarded as a cause of loss only, not as a circumstance which in its effects might more or less exert an influence upon the other perils of the policy.

If the parties intended to employ the word "insurrection" otherwise than as a risk, they would have added other words. It is presumed they employed the word in its ordinary and usual-signification. It has no technical meaning. In common parlance, a loss by insurrection would be understood as a loss of such of the slaves as should die in the insurrection, or by wounds received therein, or who were otherwise disabled by the insurrection, so that their value would be diminished more than one-half. Are not such the consequences which the underwriters may be fairly supposed to have had in view, in inserting the clause in the question?

No loss of slaves had ever before taken place where the British interference was preceded by an insurrection. This was an extraordinary state of things, which, it is natural to presume, was not contemplated by either of the parties. Nothing shows that the underwriters, at the making of the policy, intended to cancel their promised indemnity, in case an insurrection should happen.

The impropriety of construing this clause as a condition precedent, is well illustrated by the remarks of Judge Breckenridge, in the case of *Mackie v. Pleasants*, 2 Binney's R. p. 379. There it was contended that the words "British brig," by which the vessel was described in the policy, amounted to a warranty as a condition precedent. But Judge Breckenridge said: "The manner in which the words are introduced, strikes me as indicative of laying too little stress upon them by the parties, to construe them a warranty. It cannot reasonably be supposed, and ought not to be supposed, that the insurer, expecting a warranty of such extent, would rest satisfied with having it so loosely and uncertainly expressed. *It is his own fault not to have had it clear of all ambiguity; and, on the principle that the instrument shall be construed most favorably for the assured in a doubtful case—* and to me this is at least doubtful—I incline for the assured."

After the general risks of pirates and restraints of princes, included in the printed form of the policy, and the special words reiterating the risk of British interference as the great danger to be apprehended, had the plaintiff been told that the promised indemnity might be frustrated by an insurrection preceding the interference, is it to be believed that he would have accepted a policy which might be totally defeated by such a state of facts? And that, too, while other offices were making insurance at the same rate, without this restriction, since made so formidable?

Regard the place where that word is inserted. The printed clauses first express the risks usually assumed by the underwriters. Next follows the list of the exceptions to their liability. Afterwards is inserted the clause, to obtain which the high premium is given, extending the policy to "all risks." Then follows, in its proper turn, the exceptions to the liability of the company for losses caused by "elopement, insurrection and natural death."

If the parties intended that one of these perils should be a condition precedent of the contract, they intended that each of the other two should also be considered similar conditions.

This rule of construction is not now invoked for the first time. It was sanctioned in the case of *De Hahn v. Hartley*, 1 Durnford & East's Rep. 343. The policy in that case contained the following clause: "Sailed from Liverpool, with fourteen six-pounders, swivels, small arms, and fifty hands or upwards, copper-sheathed." On her departure from Liverpool, the ship had only forty-six hands on board, but six hours afterwards she took in six hands more, and always subsequently had on board more than the fifty hands mentioned in the policy. Upwards of five months had elapsed before the ship was captured on the coast of Africa, at and from which place to her port of discharge in

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the West Indies, she had been insured. The question was, whether her having sailed from Liverpool with only forty-six hands, discharged the underwriter. It was contended, that the part of the clause relating to the number of hands, was not a warranty, because "it relates merely to the force of the ship at Liverpool, before the voyage commenced, and is totally unconnected with the risk insured."

But Lord Mansfield and his associates, thought otherwise. They considered that the different words of the clause could not be separated, so "that that part of it which relates to the copper-sheathing, should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout."

If the argument of our opponents is correct, that the clause is a condition as to the insurrection, it follows that it is a condition as to the "elopement," and as to the "natural death." If the clause creates a condition as to one, it creates a condition as to each of the others. The inference then must be, that the parties intended to annul the whole policy, if a single slave should die of disease, or escape clandestinely!

It is said the word *warranty* is used, and, therefore, the presumption is, that it was used as a condition. The word employed is "warranted," and it is equally applied to "elopement" and "death," as to "insurrection." It can hardly be contended that as to the two former, it is to be construed as a condition. Our opponents are driven to the necessity of maintaining, that "warranted," as applied to insurrection, denotes a condition, while, as applied to the next preceding, and to the next following word, they must admit it denotes and excepted risk! A construction so violent as that, is entitled to little favor. They must construe the clause as equivalent to this, viz: *The risks of elopement and natural death are excepted, and the policy is to take effect on condition that there shall be no insurrection on board the brig.* Is it not highly erroneous to suppose that the same word "warranted," contains these different meanings, in the same sentence?

It is also a rule of construction, that the same word shall be taken to be used in the same sense, wherever it is employed in the same contract. The word "warranted" is twice employed in the printed part of the policy, as follows: "It is also agreed, that the property be *warranted* by the assured free from any charge, damage, or loss which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war, at any time whatever. It is also agreed, that bar and sheet iron," &c., "and

all other articles that are perishable in their own nature, are warranted by the assured free from average," &c.

These are the usual clauses in a marine policy. They have acquired a well settled and well known signification. No one ever presumes to consider them as denoting conditions of the policy. No one supposes they indicate any thing more than excepted risks. They are words inserted by the insurer to limit his liability by excepting certain risks. 1 *Phillips*, 677. 2 *Ib.* 467. *Hughes*, pp. 106, 211, *American edition*.

This policy being upon a peculiar species of property, it was thought necessary by the insurers to specify the risks excepted by them. Is it not natural they should employ the same word which they find used in the previous part of the policy, to indicate the excepted risks for other kinds of property?

Phillips (vol. 1, p. 712,) states that "the excepted risks are expressly specified by inserting that the insurance is to be free from, or 'warranted against' certain risks, or some other equivalent provision is inserted." See also 1 *Condy's Marshall*, 336.

The word "warranted" in the clause of the policy, is the only word which can be tortured into a condition. But the use of the word warranty, by no means implies a condition. "As any statement of a fact (says *Phillips*, 1 vol. p. 349,) "in the policy, is a warranty, though neither the word *warrant*, nor any formal expression of like import is used: so there is frequently a warranty in form, when there is none in fact. The assured often warrants the property free from average, free from detention or capture, or from other losses and perils, which is no more than an agreement that those shall not be among the perils and losses insured against, and for which the underwriter is to be liable." And see 11 *Petersdorff*, p. 318, 319. 2 *Maule and Selwyn's R.* 240. 5 *Ib.* 47. 5 *Barnwell and Alderson*, 107.

It is contended, that when the brig entered the harbor of Nassau, the underwriters had already ceased to be responsible on the policy. This can only be shown by establishing one of two things—either that the property insured has been physically destroyed by the direct and necessary effect of the insurrection, considered as the sole cause of the loss, or that the completion of the destined voyage has been inevitably prevented by the same peril.

Plaintiff's counsel do not show that a loss of life of any of the slaves insured by the policy, has been caused by any of the excepted perils. They have attempted, but most signally failed, we apprehend, to prove that the insurrection severed the tie of slavery which bound the slaves to their owners, and changed their condition to that of free men. These, it is believed, are the only

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ways in which an extinction of this species of property could be effected, within the intent of a policy of insurance.

The only question is, whether they have shown that the completion of the voyage was inevitably prevented by any of the excepted perils. The excepted perils are, "elopement, insurrection, and natural death." There is no evidence of any natural death. There was no desertion, which according to Webster, means to runaway. The only remaining question is, whether the insurers have shown that the completion of the voyage was inevitably prevented by the excepted peril of insurrection.

The general rule cannot be contested, that such facts only can be considered as are the necessary and direct consequences of the risk of insurrection. To hold the insurer liable for the distant and remote consequences of the single peril he has assumed, would be to extend his liability to other perils not contemplated at the signing of the policy, and which could not be provided against. The effect would be, to make the special insurance against a single peril cover the immediate effects of other perils, and thus turn the special policy—granted for a trifling premium—into a general policy, covering all perils, and for which a large premium would be justly due.

Marshall, (vol. 2, p. 717), lays down the rule in these words: "No evidence can be given of any loss, unless it be the *immediate* consequence of some peril insured against. That which is only a remote consequence of such peril, is not within the policy. If this rule were not adhered to, it would be impossible to draw the line, and the inquiry into the remote consequences of an accident or misfortune, would be infinite."

Phillips, (vol. 1, p. 690), states the principle as follows: "It is a rule, that the insurers are liable only for the direct, and not for the remote and *consequential* losses, occasioned by any peril in the policy."

In *Thompson v. Whitmore*, (3 Taunton's R. p. 227), the plaintiff claimed for a loss by the perils of the sea. The ship had been laid down to be cleaned and caulked, and the tides knocked away the stores under the ship, so that several planks gave way, and, on the return of the tide, she fill with water.

Lord Mansfield held that this could not be considered as a loss by the perils of the sea, and non-suited the plaintiff.

In *Jones v. Schmoll*, (1 Durnford & East's R. p. 130), the policy upon a cargo of two hundred and twenty-five prime slaves, exempted the insurer from loss by mutiny under ten per cent. The slaves all revolted while the ship was on the coast of Africa. The revolt was finally suppressed, but the crew had been obliged to fire upon the slaves, and attack them with weapons. Nineteen were killed during the mutiny, or died of their wounds,

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and the insurer paid for them without objection. Thirty-six others died from hanging down in the water by the chains and ropes, or from swallowing salt water, or from fluxes and fevers, or from abstinence, or chagrin at their disappointment.

The plaintiff contended that all the thirty-six slaves had died, though not in the mutiny, or of wounds received at that time, yet in *consequence* of the mutiny, and therefore the insurer was liable for them. But Lord Mansfield held they did not die by mutiny, and that the insurer was not liable for them. There was also a claim for loss upon the slaves that survived, by depreciation of their value by the mutiny, but this also was held not to be a direct consequence of the mutiny.

In *Green v. Elmslie*, (quoted 2 Condyl's Marshall, p. 719), the plaintiff claimed for a loss by perils of the sea. The ship was driven by a gale of wind on the coast of France, and there captured. Lord Kenyon held the loss was not the consequence of the sea perils, for had the vessel been driven elsewhere, she would have been in safety.

May we not say, on the same principle, that the loss was not the consequence of the insurrection, because, if the brig had been driven elsewhere, the slaves would not have been emancipated, and thus placed beyond the reach of their owners?

In *Delano v. Bedford Insurance Company*, (10 Mass. R. 354), the ship was insured from Savannah to Great Britain. The plaintiff alleged a loss by the embargo. That law was passed after the date of the policy, and prevented the ship from leaving Savannah on her voyage. It was enacted to continue in force ninety days, but, before that period elapsed, war was declared, and the voyage became unlawful.

Mr. Justice Sewell, in giving the opinion of the court, says, that "the declaration of war with Great Britain, which defeated the voyage insured, by rendering it unlawful, is, in no sense, as it regards the rights of these parties, a consequence of the embargo. The two events are unconnected and distinct. As to the voyage insured by this policy, the *consequence* of the embargo, supposing the detention to have terminated at the time prescribed, is *unknown*."

In the case of *Law v. Goddard*, (12 Mass. R. 115), the plaintiff claimed for a loss by capture, which was the only peril insured against. The ship, bound from Copenhagen for New York, was captured by a British vessel of war, and ordered into Halifax. On her way to Halifax, and while in possession of the prize-master, she was cast away, in consequence of the thick weather, and went to pieces.

Chief Justice Parker, in pronouncing the decision of the court, declared that the loss was not by capture, and he assigns

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as a reason, "because the loss was not the immediate and necessary effect of the capture, according to the case of *Green v. Elm-slie*, which, although a *Nisi Prius* case, has been since considered as law by the court of King's Bench, and by Marshall in his treatise. *Nor is it certain that it may be attributed to that at all.*"

It was evident, in that case, that but for the capture, the ship would not have been carried into the thick fogs of the banks which lie off Halifax, and so would not have been lost. So our opponents say, that the interference could not have taken place, if the brig had not been carried into Nassau. If this decision is respected, it cannot be said that the loss of the slaves was the effect of the insurrection, any more than the shipwreck was the effect of the capture.

See, also, the case quoted by Phillips, (vol. 1, p. 690).

Where the parties wish to extend the responsibility to the remote and consequential losses, special words to that effect are inserted in the policy.

Thus, in the case of *O'Reilly v. Royal Exchange Assurance*, (4 Campbell's R. 247,) the clause inserted was, "warranted free from capture and seizure, *and the consequences thereof*, in the port of La Guayra.

And in the case of *Hahn v. Cobbett*, (2 Bingham's R. p. 205,) the clause was, "warranted free from capture and seizure, *and the consequences* of any attempt thereat."

The only consequences which can be considered as immediately and directly flowing from the insurrection, are :

1st. The temporary control of the brig, obtained by the nineteen culprits.

2d. The departure from the line of the voyage.

3d. The going into the harbor of Nassau.

4th. The delay in that harbor.

None of these circumstances, nor all together would authorize an abandonment as for a total loss ; and, if such right ever existed, it was lost by the failure to exercise it before the interference. See *Hunt v. Royal Exchange Assurance*, 4 Maule and Selw. 54. *Anderson v. Wallis*, 2 Ibid, 254. *Murray v. Hatch*, 6 Mass. 465.

From these cases it may be inferred :

1st. That no retardation of the voyage, unless so great as to destroy the cargo or deprive it of value, will authorize an abandonment for a total loss:

2d. No interruption of the voyage will authorize an abandonment for a total loss, unless it be such an interruption as must inevitably defeat the voyage.

According to the evidence, if the interference had not taken place, the brig would have departed from Nassau on her voy-

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age, on Friday, the 12th of November, making a delay of only four days.

But let us admit for the sake of argument, that the damage sustained as the immediate and necessary consequence of the insurrection, was sufficient to authorize a claim for a total loss.

As the property insured was not physically destroyed, the *spes recuperandi* remained, and the insured could not recover without an abandonment of it to the insurer. *Anderson v. Royal Exchange Assurance*, 7 East's R. 38. *Davy v. Milford*, 15 lb. 559. *Mellish v. Andrews*, lb. 13.

To make the abandonment effective, it is necessary that it should be made on a knowledge of the facts which would authorize it, and it is further necessary, that the same state of facts on which the abandonment is based, should continue unchanged from the time of the technical loss, up to the time the abandonment is actually made. If the property has been restored to the assured, or if, by any peril not covered by the policy, the property has been placed beyond the reach of the assured, so that he cannot abandon it to the insurer with any effect—if, in a word, by a peril not insured against, the *spes recuperandi* has been destroyed, before the abandonment is actually made, the right to make it has ceased to exist, and the underwriter is discharged from liability. See *Hamilton v. Mendey*, quoted 11 Petersdorff, 256. *Livie v. Janson*, 12 East, 650. *Bainbridge v. Neilson*, 10 lb. 329.

V. The taking the vessel out of her course, from the time she left the route to New Orleans on Monday evening, to the following night when she reached Nassau, was the only way in which the revolt interfered with the direct prosecution of the voyage. The running off with the brig was, on the part of the nineteen culprits, an act for which the insurer would be responsible, as an act of pirates, thieves, etc., within the printed clause of the policy.

The slaves on board the Creole were possessed of the same capacity to commit offences, in the same manner and to the same extent, as if they had been free persons. Their *status* of slavery conferred no immunities in that respect.

The offence of piracy, by the common law of England, consists of those acts of robbery and depredation upon the high seas, which, if committed on land, would amount to felony there. But by the marine law, no taking of property is necessary to constitute the crime. And the common law was early enlarged by statute. By the act of William III, any person who shall make a revolt in a ship, is pronounced to be a pirate. By the act of George I, every person is declared to be a pirate, who shall in any way consult, combine, confederate or correspond

with any pirate upon the seas, knowing him to be guilty of piracy. It was held by an eminent English judge, that a person who stood on the shore and shot a person on board a vessel aground in the stream, committed piracy.

In the United States, the act of Congress of 1790, pronounces every person a pirate, who shall, upon the high seas, commit murder or robbery, or any offence, which, if committed within the body of a county, would be punishable with death. 4 *Blackstone's Com.* p. 72. 2 *Chitty's Commercial Law*, 119. 13 *Petersdorf*, 349. 1 *Hawkins' Pleas of the Crown*, p. 254, sec. 16. *Gordon's Digest*, p. 738, No. 2635. 10 *Encyclopædia Americana*, p. 151, word, *Piracy*. See also 1 *Phillips*, 648. *Hughes*, 174.

We conclude that the defendants should be liable under the printed words of the policy, if the insurrection be considered as the cause of the loss.

But it is said that the insertion of the written clause providing for the excepted risk, prevents such an inference here, although it might be legitimate if the exception were not inserted.

The company say to the owners: "We insure you against piracy and theft, but not against insurrection. If a loss occurs by acts of pirates, we will make good the loss. It is unnecessary to look further, since we assume that risk by name. If a loss is not caused by one of the risks expressly assumed, and, if it happen by insurrection, we are discharged."

So of the other perils named in the policy—barratry of the master, for instance. If the master commit an act of barratry by engaging in illicit or contraband trade, it is no defence to the insurer to urge, that the assured has warranted against the illicit and contraband trade which caused the seizure and loss of the vessel. The defence of illicit or prohibited trade would of course prevail, if it was not also a loss by the peril of barratry of the master, expressly assumed.

In other words, where a loss happens, the proximate cause of which may be both a peril expressly assumed, and a peril excepted, the latter must yield to the former, in order to give that indemnity to the assured, which is the great object of the contract.

In *Lawrence v. Aberdeen*, (5 Barnwell & Alderson), insurance was effected on mules and oxen, "warranted free of mortality and jettison." Most of them died during the voyage, by reason of bruises occasioned by the rolling and pitching of the ship during a violent storm. The question was, whether the insurer was exonerated by the clause of warranty.

The court of King's Bench held, that it was a loss by sea perils: "It consequently falls within the risks enumerated in the

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policy, and *it seems to us* that it is not excepted out of those perils by the words *warranted free from mortality and jettison*. Independently of these words, the underwriters would undoubtedly have been liable as for a loss arising from a peril of the sea. *These words were the language of the underwriters, and were introduced by them to protect themselves from a particular species of loss.* By the terms of the policy, they insured against the perils of the sea, &c., and all other losses and misfortunes that should come to the hurt, detriment and damage of the subject matter insured."

"Now the exception must be considered as engrafted on these general words of the policy, and the whole should be read together as one sentence, and then it would stand thus: 'And the underwriters will be liable for losses by perils of the seas, and all other losses, except losses by mortality and jettison.' The circumstances of the parties having inserted the word jettison, signifies to us that they did not contemplate the case of violent death," &c. They accordingly determined, "that the word mortality in this policy must be understood in its ordinary and popular sense, as importing its arising from natural, and not from violent causes; and that, being so, there must be judgment for the plaintiff."

We have pursued the course adopted by the court in that case. We have first inquired whether the underwriters would be liable for the acts of the nineteen, independent of the words warranted free from insurrection. We have, we think, proved that they would be so liable, in the same manner as the insurers in the above case would have been.

We have next placed the risks assumed in connexion with the exception, and have argued that the same rule of construction should be applied, viz: that the "insurrection" of the policy should be understood in its ordinary and limited sense, so as not to destroy the effect of the risk of piracy expressly assumed. The court in that case so construed the exception or warranty of "mortality," though in its general signification it clearly would imply every kind of death, so as to limit it to that species of death not properly falling within the perils of the sea, which were insured against. See *Wilcocks v. Union Insurance Co.*, (2 Binney, 575). *Brown v. Union Insurance Co.*, (5 Day). *Suckley v. Delafield*, (2 Caines' R., 222). *American Insurance Co. v. Dunham*, (12 Wendell, 463—15 Ib., 11).

VI. As to the argument that the revolt was caused by an inherent vice or defect in the slaves, against which the plaintiff warrants the insurers, see 4 *Pothier*, (Ed. Dupin), p. 465, *Traité d'Assurance*, No. 66. *Valin*, p. 472, 477. 1 *Emerigon*, p. 393. 1 *Phillips*, 229. *Hughes*, 254, 255, 258. *Smith's Mercantile Law*, 219. 1

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Condy's Marshall, p. 216, 217. 23 *Merlin Répertoire*, p. 414, *Verbo, Police et Contrat d'Assurance*.

VII. It has been contended that the insurrection caused a deviation from the line of the voyage and enhanced the other perils, and that the insurers were thereby released. It is readily conceded, that a deviation not justified by necessity, determines the policy from the moment the deviation actually commences. It is also conceded, that the departure of the brig from her course to New Orleans, when opposite Nassau, was a sufficient departure, and that unless justified by necessity, would relieve the company from liability for any subsequent loss.

The first inquiry is, therefore, whether the deviation in this case was justified by necessity?

The clause in the policy authorising the deviation, explains its nature and limitations. It is as follows: "And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at any ports or places, if thereto obliged by stress of weather, or *other unaviodable accident*, without prejudice to this insurance." Shipwreck, sea damage, necessary repairs, sickness of officers or crew, want of provisions, mutiny of crew, are the usual cases of deviation justified under this clause.

In this instance, the facts show most conclusively, that an overwhelming necessity—the menaces and commands of the criminals, with drawn knives—the eminent danger of loss of life—compelled the officers of the brig to continue her course direct to Nassau, from the point where the New Orleans route separates from the other.

The occurrences at Nassau, show that there was no unnecessary detention at that place. It was owing to causes over which the officers of the vessel had no control, and for which the plaintiff is not responsible.

It is contended that a deviation caused by an excepted risk, avoids the policy, and several decisions are relied on.

Roget v. Thruston is quoted. The decision is unquestionably correct. French risks were excepted. The ship was captured by a French privateer, recaptured by an English frigate, and the cargo was condemned as French property. The court held it was a loss by French risks, because "the terms of the exception must mean that the insurer is not liable for any loss by the acts of Frenchmen." The remarks of the judge—Radcliff was his name—relied on by our opponents, were *obiter dicta* entirely, made forty years ago, when insurance law was in its infancy; and, though Chancellor Kent was then on the bench, they are no where alluded to by him, nor any of the other judges, when the question was afterwards directly presented

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in *Robinson v. Marine Insurance Company*, nor by any other judge in any other case, nor by Chancellor Kent in his Commentaries. They are, therefore, entitled to no consideration.

Breed v. Eaton is, we think, entirely misunderstood, and we are sorry to see that Mr. Phillips, (vol. 1, p. 549), has fallen into the same error. The sea-damage, which was the subject of controversy there, occurred before the deviation took place, and as the deviation leaves the underwriter responsible for previous damage, the decision would have been palpably wrong, if it had proceeded on that ground, as supposed by our opponents and Mr. Phillips. On the other hand, the policy was made while the non-intercourse act was in force, which rendered unlawful the importation of the goods insured. This point was relied on, and was, in fact, sustained by the court, though the case is very carelessly reported, and might easily lead into error.

O'Reilly v. Royal Assurance Company, is inapplicable, for the ship proceeded to sea in an unseaworthy condition, and afterwards deviated voluntarily—either of which facts distinguish that case from the one before the court.

Let us briefly examine the authorities in support of our view of the law.

Marshall, (Condy's ed., vol. 1, p. 204), lays down the rule, that deviation is justifiable, "though it proceed from a cause not insured against."

Kent, (vol. 3, p. 317), states the law in a similar manner.

Phillips, (vol. 1, p. 551 and 555), declares the law to the same effect.

In *Scott v. Thompson*, (4 Bosanquet & Puller, p. 81), the point was expressly decided, after full argument.

Green v. Elmslie, (Peake, p. 212), was to the same effect.

Robinson v. Marine Insurance Company, (2 Johnson's R. p. 89), decided by Chief Justice Kent, and Judges Tompkins, Spencer and Thompson—and but one judge dissenting—maintained the same principle.

It is believed that no adverse decision has ever been made, either in England or in the United States.

In each of the cases the perils were increased, but that is always regarded as one of the incidents of every policy, where the perils are divided. There is no more reason why the increase of the perils to be borne by the underwriter by the perils to be borne by the assured, should release the former, than there is that he should be held responsible, because the excepted risks have been enhanced by the perils assumed by him. Nothing will render him responsible, but a loss directly caused by a peril assumed, and nothing should discharge him except the loss is directly caused by the excepted risk. 1 Phillips, 555, 713, 716, 717.

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VIII. The loss was occasioned by British interference.

The slaves of the plaintiff were carried into the port of Nassau by piracy. The will of their owners was not consulted; nay, the agent of one of them sealed his resistance with his blood.

The laws of the United States protected the rights of the owners, at the time of the departure of the brig from the limits of Virginia. Those laws followed the brig and her cargo upon the voyage. The right to this protection was secured to the owners by the flag under which the vessel sailed, and the license which she possessed. No act had been done by the owners, or by any person for whom they were answerable, to relinquish or forfeit these rights. Murder and robbery had taken place, but they increased rather than diminished the rights of the owners, as American citizens, to protection.

But the force which compelled the officers to go into that harbor, conferred no power to interfere with the rights of property on board. Such a power would be inconsistent with the duty which is imposed upon all nations to succor the citizens of each other, when their persons or property are driven into the harbors of a friendly nation by shipwreck, or other disaster of sea. All the rights of property in persons or things on board, were secured by the laws of the United States, which accompanied the vessel into the port of Nassau.

It is true, the vessel and her cargo were in possession of the culprits. But when has piracy been considered as vesting the right of property in the pirates? If the vessel and cargo were received and treated as if they were lawfully in the possession of the captors as owners, was it not rendering aid and support to the pirates, and co-operating with them to place the stolen property beyond the reach of the owners?

See U. S. Senate Documents, vol. 3, 1838-9, Doc. No. 216, p. 8, 30, 31. U. S. Senate Documents, 1842, Doc. No. 137, p. 2, 6. U. S. Senate Documents, 1844, Doc. No. 135, p. 4, 5, 7. Ashburton Correspondence, p. 17, 18, 21, 24. Resolutions of U. S. Senate as to the Enterprise. Calhoun's Speeches, p. 380. See also the speeches of senators Benton, Rives, and Conrad on the Treaty of Washington. Mr. Levy's speech in the House of Representatives on the recent Florida case; and the correspondence accompanying the Treaty of Annexation. The Louis, 2 Dodson, 251. The Diana, 1 Ib. 97. 1 Martens, 200, 202. 1 Vattel, 314, 397.

Let us next look at the powers which were claimed by the authorities of Nassau, over the persons and property on board the Creole.

The Attorney General testifies, that the slaves on board an

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American vessel, sailing from one port of the United States to another, and driven by necessity or force into a British port, become free, and that the right of their owners ceases; that the owners would not be allowed to exercise any control over such slaves, even while on board the vessel: that if the owners should have recourse to violence to enforce their control as masters, the authorities of Nassau would interfere and punish the masters, in the same way as if the slaves were free.

Such are the doctrines of the British ministry. See *U. S. Senate Documents*, 1838-9, Doc. 216, p. 15, 26. See also *Lord Aberdeen's letter, in the correspondence of the Treaty of Annexation*. That these doctrines were applied to the slaves on the *Creole*, and that they were liberated by the interference of the British authorities, is conclusively proved by the evidence.

Let us admit, for the sake of argument merely, that the plaintiff is, as owner, liable to the company for the torts of the slaves, and that the acts of piracy sprang from a natural vice of the property insured, and thus were a cause of loss not covered by the policy. Let us see whether this admission would lead the court to a different conclusion, as to the cause of the loss of the slaves.

When the Consul came on board, every trace of insurrection had vanished. Gifford was placed in command, without resistance; the American flag was hoisted, without obstacle; and four hours elapsed before the military guard set foot on the *Creole*. The American witnesses all testify that but for the British interference, the *Creole*, with the slaves on board, might have been brought to New Orleans.

But it is contended that the witnesses are all wrong; that the interference was not the cause of the loss, and that it was the insurrection which prevented the slaves from reaching New Orleans. It is contended that this results from the legal principles of insurance. We are referred to several decisions.

In the case of *Hahn v. Cobbett*, it is decided that the cause of the loss was shipwreck, rather than the subsequent capture. Why? The decision informs us: "The ship is totally lost; and though the goods are afterwards recovered in a damaged state, they fall into the hands of an enemy; and, *but for that circumstance*, would also have been totally lost. It is asked, when can the goods be said to have been lost? When the ship was totally lost. *There is no statement that any other ship was at hand, or that any land was near.* The vessel and cargo were wrecked, and a total loss incurred before the enemy interfered." This is the turning point of the case.

Here it is not proved that, "but for the circumstance" of the

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British interference, the slaves would have been totally lost. On the contrary, the record is full of evidence that, "but for that circumstance" the slaves would have been safely brought to New Orleans.

In *Hahn v. Cobbett*, the two facts which controlled the decision, were these :

1st. That by the sea-damage to the greater part of the cargo, and by the stranding and breaking up of the ship on an unfrequented coast, the voyage was inevitably defeated, and an actual total loss had taken place.

2d. That the seizure by the enemy was the only means of saving anything from the wreck, and as that was an excepted risk, the total loss was equivalent to the physical destruction of the whole property.

Patrick v. Commercial Insurance Company, a case of insurance upon the vessel, is relied on. The ship was driven by a storm high upon the shore, and buried in the sand, and afterwards the wreck was burnt. The question was, whether it was a loss by sea risk—the only peril insured against in the policy. Clearly, the peril of the seas. Why? Chancellor Kent tells us, it is because the ship had been driven in a gale "high and dry two hundred feet above high water mark, and was buried in mud and sand to within three streaks of her bends. The master believed the ship to be bilged, but could not ascertain the fact. She could not have been got off without taking her to pieces, or digging a canal, *which would have cost more than the value of the ship.*"

Is it pretended that the insurrection of the nineteen had deprived the slaves insured of all value? Otherwise, this case is in our favor.

In the case cited, the fact that the ship was buried in the sand, was equivalent to being sunk in the water. It was, in other words, equivalent to the total physical destruction of the thing insured. To make that case applicable to the present, the counsel are obliged to contend that the bare fact of going into the harbor, did, *per se*, destroy the character of slaves, which they possessed before that event, and made them free men.

In another case relied on, that of *Schiefflin v. New York Insurance Company*, Chancellor Kent supposes a policy which covered capture only. The vessel was captured and never released, but was shipwrecked. It was held that capture was the cause of the loss, because capture was that which prevented the vessel from continuing the voyage, and of itself authorized an abandonment. The loss was total before the shipwreck.

To enable the defendants to avail themselves of this decision,

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they were bound to show that the slaves were prevented by the revolt, *per se*, from being brought to New Orleans—a state of things directly contradicted by all the evidence in the cause.

In *Magoir v. New England Marine Insurance Company*, the same principle was settled. There was also a capture, and, during the capture, a loss by exposure in a hot climate. The court begins by stating, that the capture, *per se*, constituted a total loss within the policy—that is, that the capture of itself was a sufficient and adequate cause, without the exposure, to prevent the further prosecution of the voyage. The capture alone was a total loss. How different were the facts in that case from those in the present. See also *Barker v. Blakes*, 9 East, 283. And *Savage v. Pleasants*, 5 Binney, 403.

So in *Totten v. Ocean Insurance Company*, also relied on by our opponents, Judge Story puts the case of a ship burnt to the water's edge, so that she immediately filled and sunk. Surely the burning of the ship to the water's edge, so as to let in the water, was a cause adequate of itself to prevent the prosecution of the voyage.

It was in itself a total loss, by the physical destruction of the property. The loss being total, that which produced it was its proximate cause, viz., fire.

In endeavoring to apply these decisions, the counsel appear to overlook the great principle which pervades them, viz: that a loss which is once complete by the physical destruction of the property, or what is equivalent thereto, fixes the rights of the parties, and renders it unnecessary to look to any subsequent event.

They take for granted that, on Friday, the 12th of November, the voyage was inevitably defeated. But as this is a fact directly disproved by the evidence, the authorities are irrelevant, however correct they might be as applied to the facts for which they were intended. See also the cases cited in 1 Phillips, 690.

But "every loss must be imputed to its immediate, and not to any remote cause," says Marshall, (p. 418). See also, *Waters v. Merchants Louisville Insurance Company*, (11 Peters, 223).

Phillips, (vol. 1, p. 694,) states the law as follows: "If a loss is occasioned by different perils, it is usually to be attributed to that by which it is immediately occasioned. *Causa proxima spectatur*."

In *Goold v. Shaw*, (1 Johnson's Cases, 293, and 2 Johnson's Cases, 442,) the ship met with sea-damage, and put into Martinique to repair. Before the repairs could be completed, the porter and claret, forming the greater part of the cargo, would be spoiled by the heat of the climate, and a sale was thus rendered necessary. The sale being made, the voyage was aban-

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done. The question was, whether there was a loss of the cargo by a peril of the sea. The plaintiff contended it was that peril which had compelled the vessel to come into Martinique, and to abandon the voyage; and that the same peril must be considered as the proximate cause of the loss, because if the sea-damage had not existed, the sale of the articles would not have been rendered necessary.

Is the case referred to analogous to that now before the court? In the case quoted, the plaintiff sought to trace the proximate cause to what occurred on the sea. In the present case, the defendants set up the same pretension. In that case, the plaintiff maintained that the loss could not have occurred, if the vessel had not gone into port. In this case, the defendants rely on the same argument. In that case, the plaintiff contended that the vessel would have completed her voyage, but for the sea peril. In this case, the defendants say the same thing. There the defendants contended that the loss could not have occurred, but for the *heat* of the climate. Here the plaintiff contends, that the loss could not have occurred but for the *authorities* of the island. There it was contended, that the breaking up of the voyage, was caused by the sea peril, and that the vessel insured was so connected with the cargo, that the company were liable in the same manner as if the insurance had been on the cargo. Here it is contended, that the plaintiff has assumed the peril of insurrection as to the slaves insured, that he is liable for all the consequences of the insurrection as to the slaves insured, and that it is not limited to the slaves in the policy. There the defendants were liable for a loss by sea-damage, and not for a loss by the heat of the climate. Here, as it is admitted for the sake of argument, the defendants are not liable for a loss by insurrection, but they are liable, in express terms, for a loss by interference.

What was the decision? That the loss was not caused by a peril of the sea.

Tatham v. Hodgson, (8 Durnford & East's Rep. 656,) was an insurance upon slaves. The voyage was unusually prolonged, so that the ship became short of water and provisions; and it became necessary to throw a part of the slaves overboard. The question was as to the cause of the loss: was it, or not a peril of the sea?

It was evident then, that but for the unusual prolongation of the voyage by bad weather, the provisions and water would not have given out. The want of provisions and water, under the circumstances, was a peril of the sea. It was also evident, that but for this peril of the sea, the loss would not have occurred.

But these facts were not considered sufficient by the court, which decided that the loss was not caused by a peril of the sea.

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The case of *Delano v. Bedford Marine Insurance Company* (10 Massachusetts Rep. 347,) is directly in point. The ship *Emulous* and cargo were insured from the United States to Great Britain. Before the vessel departed from Savannah, she was arrested by the embargo imposed for ninety days, and during that period war was declared, and the voyage was thus made unlawful. The question was, whether the embargo was the cause of the loss.

The analogy existing between that case and the present one, is very close.

In both cases the loss is admitted, and the only question is, to ascertain the proximate cause.

In that case, the embargo was a peril covered by the policy, and the war was not covered by it. If the embargo was the cause of the loss, then the insurer was liable; but, if the war was the cause, then the insurer was discharged.

In that case, the embargo continued until the war was declared, and was only terminated by the declaration. The ship was detained in port by the embargo, when the war was declared. In other words, the ship was under the operation of one peril, when another peril intervened, and a total loss ensued. The declaration of war could not have effected the policy, but for the previous detention caused by the embargo.

In this case, according to the arguments of our opponents, a similar state of facts existed.

They say that while the slaves insured were under the operation of an excepted peril, the interference occurred, and that the excepted peril must be treated as the proximate cause of the loss. But their claims find little support from this decision.

The court held, that though the embargo had remotely occasioned the loss, yet that it could not be considered as the proximate cause.

The court say: "If the *Emulous* had been stranded and wrecked in the port of Savannah, while detained there under the embargo, the insurers would have been liable for the loss; but not upon the averment of a loss by detention; although it might be argued that it was entirely the consequence of the detention, and that, but for the embargo, the peril, by which the ship had been lost, would not have been incurred. In every question of loss demanded upon a policy of insurance, it is the immediate and direct, not the remote or contingent cause of the loss, which is to be regarded, in stating and maintaining the title of the assured to recover upon the contract."

In *Hodgson v. Malcolm*, (2 Bosanquet & Puller's New Reports, p. 236), the plaintiff declared for a loss by the perils of the sea. As they were warping the ship into port, a part of the

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crew were sent ashore in the only boat of the ship, to make fast one line and cast off another. The men were instantly impressed by the king's officer, and were prevented from performing their duty, whereby the ship sprung a leak, immediately grounded, and otherwise suffered heavy damage.

The underwriters contended that the acts of the press gang in seizing the sailors, was the cause of the loss, and being an act of the public authorities, they were not liable. But the court said: "The press gang is not the necessary cause of the loss; for, supposing all hands to be taken out of a ship at sea, still the ship might be picked up and saved. *An act of that kind, therefore, is not the inevitable cause of the loss.*"

In that case, the force exerted upon the crew, was instantly followed by the damage. Yet was the force considered the remote cause, and as not discharging the underwriters for the loss, the cause of which was a peril of the sea.

In *Smith v. Scott*, (4 Taunton's Rep. 126), the plaintiff declared for a loss by perils of the sea. The ship Margaret ran foul of the Helena, by the grossest neglect. There was but one man on the deck of the Margaret, and he was asleep. It was contended this was not a loss by perils of the sea, but by the gross, culpable negligence of the crew.

But the court decided otherwise. "We do not," say they, "know how to make this out not to be a peril of the sea. What drove the Margaret against the Helena? The sea. What was the cause that the crew of the Margaret did not prevent her from running against the other? Their gross, culpable negligence; but still, the sea did the mischief."

Thus it was obvious, that the collision could not have happened, but for the gross negligence of the crew. Yet that was considered as the remote cause only of the loss.

In *Hadkinson v. Robinson*, (3 Bosanquet and Puller's R. p. 392), the court held that, in order that the loss happen from a peril insured against, it is necessary that it "be a peril acting upon the subject insured against *immediately*, and not *circuitously*."

In *Forder v. Christie*, (11 East. 205), there was a detention of the vessel by the king's ship in the Baltic, and afterwards a hostile embargo was laid on British vessels at St. Petersburg, the port of destination; whereupon the ship returned to Hull, her port of departure, and the owners abandoned for a loss by detention of princes.

The Court of King's Bench held that the proximate cause of the loss was not the detention, but the embargo. "Suppose," say they, "there had been foul weather to a certain point of the voyage, and then bad weather and adverse winds, which had prevented the vessel from entering her port of destination till she had received advice of the embargo, which obliged her to

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put back ; could that have been declared upon as a loss by the perils of the sea ? And yet that might as well be said to be the *causa remota* of the loss of the voyage, as the detention in this case ; but that will not do : *the risk insured against must be the effective cause of the loss, in order to charge the underwriters.* But here there was the concurrence of another overbearing cause, namely, the hostile embargo in the destined port, which was the immediate cause of the ship's return, and of the loss of the voyage."

In *Powell v. Gudgeon*, (5 Maule & Selwyn's Rep. 436), the ship met with sea-damage, put into port, and it became necessary to sell part of the cargo to pay for the repairs. The plaintiff claimed as a loss by perils of the sea.

Lord Ellenborough, in pronouncing the opinion of the court said : "I am inclined to think the damage in this case is to be considered as not arising immediately from a peril of the sea, although, in a remote sense, it may be said to have been brought about by a peril of the sea ; but our rule of construction is, *causa proxima, non remota spectatur*. In conformity, therefore, to the rule, that the proximate cause, and not that which is remote, is to be looked to, I think the underwriter is not liable."

There the loss was rendered necessary by the sea-damage to the ship. Yet the court refused to recognise the peril of the sea as the proximate cause.

In *Livie v. Janson* (12 East's R. p. 652,) the ship *Liberty*, in attempting to escape at night from the port of New York, was carried ashore upon the rocks by a body of ice, and a large hole was made in the side by the ice, and another in the bottom by the rocks. The water soon rose four feet in the hold, and the ship fell down on her side as the tide left her. During the night, the captain, with his officers and crew, all abandoned the vessel. In that condition she was, on the next day, seized by the government officers for a violation of the embargo law, and was afterwards, with her cargo, condemned on that account. There was a warranty against American condemnation. The question was, whether the proximate cause of the loss was a peril of the sea, or the American condemnation : if the former, the insurer was liable ; if the latter, he was discharged.

Lord Ellenborough, in pronouncing the decision, said : "It appears to me that this case falls within the general principle, that *causa proxima, non remota spectatur*. It therefore seems to me to be useless to be seeking about for odds and ends of previous and partial losses, which might have happened to a ship in the course of her voyage, when, at last, there was one overwhelming cause of loss which swallowed up the whole subject matter. It is to be recollected, that nothing is properly im-

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putable to the sea-damage, but the deterioration of the ship and cargo; for, though such sea-damage might stop the progress of the voyage, *and so bring the ship and cargo within the reach and effect of some other distinct peril, which they might otherwise have escaped, yet the substantive loss by that latter peril is imputable to that latter peril only, not to the previous sea-damage.* If, for instance, a ship meet with sea-damage, which checks her rate of sailing, so that she is taken by an enemy, from which she would otherwise have escaped, though she would have arrived safe but for the sea-damage, the loss is to be ascribed to the capture, not to the sea-damage; and this upon the principle that *causa proxima, non remota spectatur*. The case of *Green v. Elmslie*, which was cited in the argument, proceeds upon a similar principle. There the ship would not have been captured, had she not been driven by stress of weather upon the enemy's coast; and yet the loss was held imputable to the capture, and not to the perils of the sea, which had driven the vessel within the influence of the perils of capture."

Can it be said that the situation of the Creole, when the interference took place, was more precarious than that of the Liberty when she was seized by the custom-house officers? If it be urged that there was little prospect of the brig being able to bring the slaves insured to New Orleans after the insurrection—may we not say, there was no prospect of the ship being able to complete the voyage, after she had been abandoned by every person on board—was then derelict—surrounded by the floating ice—hard upon the rocks—two holes in the hull—and her hold filling with water by each influx of the tide? Indeed it is considered that the situation of the ship would have authorised an abandonment for a total loss, if it had been made prior to the seizure. 1 Phillips, 694.

In *Barnes v. Maryland Insurance Company*, (5 Harris and Johnson's R. p. 139), the schooner Hawk, warranted free from seizure in port, was captured at sea and carried into port, and afterwards was taken into the public service, by order of the minister of marine, without any judicial proceedings.

If the capture at sea was the proximate cause of the loss, then the insurer would be liable, but if the seizure in port was the proximate cause, then he was relieved.

The court held, that "the taking of the Hawk into the service of the French government may be considered as an act distinct from the capture, and as a seizure within the letter of it." "That is," says Phillips, (vol. 1, p. 728), "the seizure in port for the public service, was considered to be the proximate cause of the loss."

In this case, the vessel had been captured at sea, and, there-

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fore, if an abandonment had been made before the vessel was taken into public service, the plaintiff might have recovered for a total loss. Still, the capture was held not to be the proximate cause of the loss.

Can it be said that the prospects of the *Creole* were more desperate after the insurrection, and before the interference, than were those of the *Hawk* after her capture at sea, and before her seizure by the order of the minister?

In *Rice v. Homer*, (12 Mass. Rep. p. 337), the ship, warranted free from capture, was disabled by a storm, was injured to more than three-fourths of her value, and, in fact, was not worth repairing. While in that shattered condition, she was captured. The question was, whether the loss occurred by a peril of the sea.

Chief Justice Parker, in delivering the decision of the court, adverted to the cases of *Green v. Elmslie*, and *Livie v. Janson*, and said, that the rule which those cases lay down, "must be considered as founded on correct principles, and as a necessary branch of the law of insurance."

It had been urged, in argument, that "in the cases decided on that principle, a partial loss only was claimed. But it is said, that in this case there was a total loss of the ship by the perils of the sea, before she was captured, because she was injured to three-fourths of her value, and was not worth repairing. We have been struck with this distinction, and have not abandoned it without much hesitation, because the technical rules only seem to prevent the plaintiffs from recovering an indemnity for the multiplied disasters of the voyage. *But, on full consideration, we are of opinion that the plaintiffs cannot prevail on this ground.* The ship, although damaged, was entire as a ship, when taken possession of by the French officers. If she had not been damaged, and had arrived at the same place, the same catastrophe would have happened. It is true, the tempest obliged her to go into that port; *but the going in was not the loss.* It was the capture; and the underwriters against capture, if there be any, must make up the loss," &c.

If any doubt should exist as to the applicability of the previous cases, the facts of the last case quoted, render it entirely similar to the *Creole* case.

In that case, the loss under the first peril was not merely a partial loss, but it was a technical total loss, before the occurrence of the second peril. The point was expressly made in argument, and decided upon mature deliberation. However great was the loss sustained by the sea-damage, still that does not, by the well settled rule of insurance, prevent the subsequent capture from being considered as the proximate cause of the loss.

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In *Knight v. Cambridge*, (quoted in 11 Petersdorff, p. 267), the Court of King's Bench, in speaking of an attempt by the insurer to narrow down his obligations, made this very just observation: "The end of insuring is to be safe at all events, and it would be very prejudicial if we were to be making loop-holes to get out of these policies."

From this review of the decided cases, the following rules of construction may be drawn:

1st. That a loss is occasioned by a concurrence of perils, either when they both commence their operation at the same moment, or when one precedes the other, but before there is a physical destruction of the thing assured, or what is equivalent thereto, and before any abandonment has taken place, the other peril supervenes, and the thing insured is then either physically destroyed, or otherwise absolutely prevented from arriving at the port of destination.

2d. That where there is a concurrence of perils, the last one which operates, is considered the cause of the loss, and is termed its proximate cause.

3d. That it does not necessarily follow that, if, while the thing insured is under the operation of one peril, a second peril intervenes and a loss takes place, the former peril is to be considered the cause of the loss.

4th. That if the damage caused by the first peril amounts only to a technical loss, or more than fifty per cent, so that the thing insured remains in specie, the second peril which supervenes is to be considered as the cause of the loss.

5th. That if the thing insured, though it continue to exist in specie, yet has been rendered absolutely worthless, and of no value whatever by the operation of the first peril, this is equivalent to a physical destruction of the property, and that peril is to be deemed the cause of the loss, no matter what peril may subsequently happen.

6th. That the act or event which occasions the loss, is to be regarded as its cause, rather than the agent which is employed, *eo instanti*, to bring about the result.

7th. That in the construction of general policies, where the loss is proved, the courts lean in favor of the insured, to give effect to the indemnity which formed the consideration of the contract, and for which the *pretium periculi* was paid.

IX. Another objection is taken to the plaintiff's right of recovery. It is contended that the underwriters are discharged by the alleged omission on the part of the officers and crew, to observe the proper vigilance and police on board, prior to the insurrection. It is said that the slaves ought to have been locked up at night, and a guard placed over the hatches. It is argued

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that if these precautions had been used, the revolt could not have happened.

In other words, the defendants contend that the cause of the loss is not the interference nor the insurrection, but the imprudence and negligence of the officers and crew. Although our opponents choose to consider it as one of the contingencies against which the assured warrants, it is evident that the objection can only prevail, if at all, by maintaining that the alleged negligence and imprudence are the cause of the loss.

The importance of adhering to the principle, *casua proxima, non remota spectatur*, is well illustrated by this objection.

The loss cannot be controverted. If the witnesses are believed, there is no doubt as to the cause. But the defendants contend that the witnesses are all wrong, because, they say, that if the insurrection had not occurred, there could have been no interference. *Ergo*, the insurrection caused the loss.

Having taken one wrong step, they continue, and say that if there had not been negligence and imprudence of the officers and crew, there would have been no insurrection. *Ergo*, the negligence and imprudence are the cause of the loss.

BULLARD, J. This case, together with six others, growing out of the loss of the slaves on board the brig Creole, which was carried by the mutineers into the harbor of Nassau, in November, 1841, and which has been the subject of so much diplomatic, as well as forensic discussion, was elaborately argued last summer, before the adjournment of the court, both by brief, and *viva voce*. They are actions upon several policies of insurance, underwritten by different insurance companies in this city, upon slaves shipped on board that vessel for this port. As all the cases relate to the same voyage, and all the slaves insured were lost at the same time and by the same disaster, they have all been considered together; and it is supposed that the opinion which we are about to pronounce in one of the cases, will be decisive of all.

The first question is, what risks did the insurers assume? In the present case, and in three others, the terms of the policy are: "Warranted free from elopement, *insurrection*, and natural death." In one of them, to wit, *Lockett v. The Firemen's Insurance Company*, it is stipulated that the "insurers are not liable for suicide, *mutiny*, natural death, or desertion." In the re-

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maintaining two cases, it is declared that the company shall not be liable for "suicide, desertion, or natural death."

In common parlance, there is little or no difference between mutiny and insurrection. In this very case, in the briefs of counsel, in the statements of witnesses, and in the official correspondence, the rising of the slaves on board is called, indiscriminately, mutiny and insurrection. The parties are supposed to have had in view, the conduct of the slaves, who formed the subject of the insurance, rather than the obedience and subordination of the crew, whose forcible resistance of the authority of the master, would be mutiny, technically speaking. The only difference, therefore, in our opinion, between that case in which the word *mutiny* is used, and those in which the policy contains the word *insurrection*, is, that in the first the *mutiny* is clearly an excepted risk, and in the others is presented the question, much discussed at the bar, whether the expressions amount to a *technical* warranty, or were only intended to exempt the insurers from the risk of insurrection. On the one hand it has been contended, that it amounts to a warranty, and that the occurring of the insurrection, whether it was the cause of the loss or not, was a breach of warranty, and put an end to the policy; while, on the other hand, it is said, that the only effect of the clause was to throw the risk of loss by insurrection upon the owners, or shippers, leaving all other sea risks to be supported by the underwriters, notwithstanding the happening of the insurrection.

The word *warranted* is used; but there is often a warranty in form, where there is none in fact; as in the familiar instances of *warranted free from average—free from detention and capture*, which mean nothing more, than that those shall not be among the perils and losses insured against, and for which the underwriter is to be liable. Although these forms of expression (says Phillips) are sometimes spoken of as warranties, it would be absurd to consider them such in their character and construction, since in an insurance *free from average*, for instance, it would be adopting the doctrine, that the occurrence of the average loss would render the policy void, and consequently the happening of a loss, which is not insured against, deprive the assured

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of the right to recover for one that is insured against. 1 Phillips, 127.

We, therefore, view the terms of the policy as not creating a warranty, but only as exempting the insurers from any liability on account of losses which might be sustained in consequence of a mutiny, or insurrection on board; they assuming all other risks, and particularly restraints, arrests, and detentions by foreign powers, or the emancipation of the slaves by foreign interference. All the cases then, which have been argued, may be classed in two categories. 1st, those in which the underwriters assume the risk of loss from insurrection; and 2nd, those in which they are exempted from that loss, by the terms of the policy. The case now under our immediate consideration, belongs to the latter class, the defendants not being liable for *insurrection*, elopement, and natural death.

The great question, therefore, upon the merits, which this case, and the others of the same class present, is, whether the loss of the slaves was caused by the insurrection, or by illegal and unauthorised interference on the part of the authorities of Nassau.

The cargo of the Creole consisted of one hundred and thirty-five slaves, besides some tobacco. She left Richmond on the 25th of October, and after remaining in Hampton Roads one day, went to sea on the 31st. Nothing occurred on board even to create suspicion, until the evening of the 7th of November, when they hove-to off the Island of Abaco. During the first watch, about half past nine, the mate, who was on deck with three seamen, was informed that one of the negro men was in that part of the hold where the women were, contrary to the regulations on board. Merritt, one of the agents on board, who was asleep in the cabin, was called up. He lit a lamp, which enabled them to see one of the slaves, by the name of Madison, in the hold where the women were. Merritt asked him, if he knew the consequences of his conduct. He replied that he did, and sprang for the hatchway to get on deck; as he got on the steps to come up, Merritt seized him by the legs and the mate by the shoulders, but he got away from them, and pushed the mate back. At that instant, a pistol was shot, which grazed the

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back of the mate's head. He flew to the cabin to call all hands, and as they came out from the cabin, whither he was followed by four or five of the slaves, the fight commenced with pistols, a musket, and bowie knives. Hewell, a passenger, was killed; Captain Ensor, badly wounded, sought safety in the main-top, whither the mate had already fled. In a few minutes the mutineers were completely masters of the brig, having subdued the officers and crew. Nineteen of them took charge, and compelled the mate and crew, by constant vigilance and threats, to navigate the brig to the port of Nassau, in New Providence. From the Hole-in-the-Wall, which they made the next morning, they compelled the crew to change the direction of the vessel from her direct course to the mouth of the Mississippi, and to steer for Nassau. The compass was watched to prevent the course being changed, and they were compelled, by threats of instant death, to take the brig into Nassau, where they arrived on the 9th of November, in the morning. It is beyond all question, that the insurrection was completely successful; all resistance was vain, and no attempt was made by the whites to regain their ascendancy. The brig was taken into Nassau by the slaves, in this state of successful revolt. It is quite unnecessary to dwell upon the particulars of the contest, which took place in the darkness of the night, but was brought about so suddenly, and yet with such evident readiness of preparation at the first signal, as to leave no doubt that the arms used were already loaded, and the plot formed so as to explode on reaching the vicinity of the Bahama Islands. The leaders of the revolt appear to have known that they were not far from those islands, and said they wished to go to Abaco. All the arms they had, except one pistol, were thrown overboard at the mouth of the harbor, to prevent their being seen. A black pilot came on board to take them in, and the mate went ashore in the boat of the health officer. This officer was requested to put the mate on shore, and to watch the vessel, and to let them have no communication with the shore until he returned. The officer watched the vessel, and the mate went with the American Consul to see the Governor; saw him at his house, and stated the case to him.

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In the meantime, it appears that the pilot, a free black, was on board, in free intercourse with the slaves.

Thus it appears, and in this all the witnesses concur, that no hopes were entertained of recovering control of the brig and the slaves on board, without assistance from abroad. The insurrection had been entirely successful, the master badly wounded, one passenger killed, and the mate and crew compelled to deviate from the course of the voyage. This was the condition of things on board up to the moment the brig was moored in the port of Nassau. The mutineers appeared to have felt so secure that they they threw their arms overboard, relying for their future safety upon their physical superiority, and upon the sympathies of the people of the Bahamas, or the direct interference of the local authorities.

Here it is proper to pause, and enquire what effect has been produced, what change operated by the entrance of the Creole into the waters of a foreign, but friendly power? What new duties and relations have sprung up, as it relates to the officers and crew of the brig, to regulate their intercourse with the public authorities or the people of the island? What treatment had they a right to expect under the law of nations, when thus driven, by an overwhelming calamity, into a British port? The judge of the Commercial Court, very properly instructed the jury, that the letter of the late Secretary of State of the United States, addressed to Lord Ashburton, on the 1st of August, 1842, and the resolutions of the Senate, unanimously adopted by that body in reference to the case of the *Enterprise*, contains a true exposition of the law of nations on this subject. Those principles are, in substance, as follows :

· That a ship, or vessel, on the high seas, in time of peace, engaged in a lawful voyage, is under the exclusive jurisdiction of the State to which her flag belongs ; as much so, as if constituting a part of its own domain. If such ship or vessel should be forced by stress of weather, or other unavoidable cause, into the port of a friendly power, she would, under the same laws, lose none of the rights appertaining to her on the high seas ; but, on the contrary, she and her cargo, and the persons on board, with

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their property, and all the rights belonging to their personal relations as established by the laws of the State to which they belong, would be placed under the protection which the laws of nations extend to the unfortunate under such circumstances. Although the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not wholly exclusive, and although for any unlawful acts, committed while thus situated, by her master, crew or owners, she and they may be answerable to the laws of the place, yet the local law does not supersede the laws of the country to which the vessel belongs, so far as it relates to the rights, duties, and obligations of those on board. Whatever may have been the state of the British law in relation to slavery, it did not operate on board the *Creole*, while lying in the port of Nassau, and before a voluntary landing of the slaves, to dissolve the relation of master and slave. That relation remained unimpaired. It is only when such slaves come under the exclusive jurisdiction of the British law, within its territorial operation, that the slave becomes free, because such relation is forbidden. To resume, in the language of Mr. Webster, in the letter above referred to: "Vessels of the United States driven by necessity into British ports, and staying there no longer than such necessity exists, violating no law, nor having intent to violate any law, will claim, and there will be claimed for them, protection and security, freedom from molestation, and from all interference with the character or condition of persons or things on board. Such vessels, so driven and so detained by necessity in a friendly port, ought to be regarded as still pursuing their original voyage, and turned out of their direct course only by disaster, or wrongful violence; they ought to receive all assistance necessary to enable them to resume that direct course; and that interference and molestation by the local authorities, where the whole voyage is lawful, both in act and intent, is ground for just and grave complaint."

Lord Ashburton, to whom that letter was addressed, in reference to this very case of the *Creole*, does not pretend to combat the general principles thus expressed, but proceeds to give that pledge which the treaty making power deemed equivalent to a treaty stipulation. "In the meantime," says he, "I can engage

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that instructions shall be given to the Governors of Her Majesty's colonies on the southern borders of the United States, to execute their own laws with careful attention to the wish of their government to maintain good neighborhood, and that there shall be no officious interference with American vessels driven by accident, or by violence into those ports. *The laws and duties of hospitality shall be executed*, and these seem neither to require, nor to justify any further inquisition into the state of persons or things on board of vessels so situated, than may be indispensable to enforce the observance of the municipal law of the colony, and the proper regulation of its harbors or waters."

With this view of the laws and comity of nations, we proceed to enquire into the occurrences in the harbor of Nassau, and the conduct of the local authorities in reference to the Creole, premising that we cannot yield our assent to the reasoning of the counsel for the defendants, who endeavored to convince us that the slaves on board the Creole became free, *de facto*, by their successful mutiny, and, *de jure*, by sailing into a British port. We regard them still as slaves while on board, though in a state of insurrection. They had not ceased to be the property of their masters, although that right of property could not have been asserted in a British court, nor enjoyed within the exclusive influence of the British law.

Let us first look at the written correspondence which took place immediately after the arrival of the Creole, between the American Consul and the Governor of the Bahamas. The official documents, letters, or correspondence which attend most transactions of any public importance, forming a part, indeed, of the *res gestæ*, afford much more satisfactory evidence of the true character of such transactions, than the statements even of the actors themselves, made afterwards from memory.

As soon as the Consul was informed of the disaster on board the Creole, he waited on the Governor, with the mate, who related the disaster on board, and then addressed him the following note:

"Sir: Having had detailed to your Excellency the particulars of the mutiny and murder on board the American brig Creole, by slaves on board said brig, I have now to request that

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your Excellency will be pleased *not to suffer any of the slaves on board to land*, until further investigation can be made."

The Colonial Secretary immediately replied: "That he was instructed by the Governor, to acquaint the Consul, that, *for the fulfilment of the object of his letter*, his Excellency had ordered a military party on board the brig; adding, however, that there would be no impediment to any of the white persons on board, landing there."

On the same day the Colonial Secretary addresses a second note to the Consul of the United States, in which he says, that, in compliance with his (the Consul's) request, he forwards to him, by direction of the Governor, a copy of the statement, communicated to him personally, in the morning, by the Governor and Council, in reference to the case of the American brig *Creole*, on board of which vessel a murder and certain other offences are alleged to have been committed. The statement enclosed is in the following terms:

"To JOHN F. BACON, Esq.,

Consul of the United States of North America:

"We wish to state to you, as the representative of the American government, that the circumstances detailed to the Governor this morning, in your presence, respecting the events which took place on board of the American brig *Creole*, on the night, and subsequently to the 7th of November, have been given all possible consideration to by the Governor and Council, by whom the following decisions have been come to:

"1st. That the courts of law here have no jurisdiction over the alleged offences.

"2d. But, as an information has been lodged before his Excellency the Governor, charging the crime of murder to have been committed on board of the said vessel, while on the high seas, it was expedient that the parties implicated in so grave a charge, should not be allowed to go at large; and that an investigation ought, therefore, to be made into the charges, and examinations taken on oath; when, if it should appear that the original information was correct, and that a murder had actually been committed, that all the parties implicated in such

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crime, or in any other act of violence, should be detained here until reference could be made to the Secretary of State, to ascertain whether the parties detained should be delivered over to the American government, or not ; and if not, how otherwise to be disposed of.

“3d. That as soon as such examination should be taken, all the persons on board the Creole, not implicated in any of the offences alleged to have been committed on board of that vessel, *must be released from further restraint.*

“4th. That a detailed account of what has taken place, should be transmitted to the British minister, at Washington.

A true copy.

C. R. NESBITT, Colonial Secretary.

“Council Chamber, Bahamas, Nov. 9, 1841.”

The military party was sent on board, and the investigation commenced in pursuance of this explicit declaration on the part of the Governor and Council, and no further correspondence took place until the 12th. The Consul and all concerned, acquiesced in the course proposed to be pursued by the local authorities. They could not have understood the expression used in the statement, that all persons not found to be implicated, *must be released from further restraint*, to mean, as has been argued, that they must be released from the authority and control of the master of the vessel, or the owners of the slaves, or their agents ; but only that the guard would be withdrawn, which had been placed on board, at the solicitation of the Consul, for the purpose of preventing the slaves from leaving the vessel. If the Consul had not so understood it, he would certainly not have consented to the terms proposed. We see in this, no disposition on the part of the Governor and Council, officiously to interfere. On the contrary, they interfered, at the request of the Consul, merely for the purpose of singling out and confining the guilty, with the explicit declaration, that, after that, they would impose no further restraint upon the other persons on board.

The investigation proceeded until the 12th, at noon, when the Consul again writes to the Governor, that in proceeding on board the brig Creole, with the magistrates, that morning, he saw a large collection of persons on the shore nearest the vessel, and many in boats, and was at the same time informed

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that the moment the troops should be withdrawn from the brig, an attempt would be made to board her by force; that he was farther informed, an attempt had already been made. He, therefore, requests the Governor to take such measures as he may deem proper, for the protection of the said vessel and cargo. He adds, that he believes those statements to be true, and that he did not accompany the magistrates, that he might communicate the same to his Excellency. An immediate answer was returned by the Governor, in the following words: "Sir, In answer to your letter this moment received, I beg to state, that I cannot think it possible that any of Her Majesty's subjects would act so improperly as to board, by force, the American brig Creole, and should such an unauthorized attempt be made, I shall be quite ready to use every authorized means for preventing it." Thus the Consul did not witness the last scene on board, when the Attorney General and the magistrates who had conducted the examination, returned with the guard, carrying away the nineteen slaves, who had been identified as the guilty ones; and when all the rest of the slaves, except four or five, went on shore, and never returned. Before we notice the discordant and contradictory statements of the witnesses relative to that occurrence, it is proper to give the rest of the correspondence, consisting of the remonstrance of the Consul at the liberation of the slaves, the answer of the Governor, and the official statement or report of the Attorney General.

On the 14th of November, two or three days after the occurrence above alluded to, the Consul writes to the Governor, that he had not been enabled, from various causes, until late on Saturday evening, to obtain a detailed statement from those on board the brig, of the proceedings of the Attorney General and those accompanying him, by which all the slaves on board the said brig, with the exception of four, were *put on shore and liberated*. Against the manner of their liberation, and all the proceedings which ultimately attended it on the part of Her Majesty's officers and subjects, he deemed it his duty to enter his solemn protest; and also, on the part of the chief mate, then in command, to protest. He goes on to say, that he regards those slaves while they were under the American flag, and regularly

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cleared from one slave-holding State to another, within the United States, as much a portion of the cargo of the brig as the tobacco and other articles on board, and whether on the high seas or in an English port, does not change their character; and that Her Majesty's government had not the right to interfere with or control the officers of an American vessel thus circumstanced, in such a course as might be necessary and proper to secure such property from being lost to the owners. He concludes by asking, that those who had been identified as the guilty slaves, might be forwarded to the United States by the *Creole*, which he expects to forward in a few days.

To this the Governor replied, as follows: "Sir, I have the honor to acknowledge the receipt of your letter of this date, and cannot withhold from you that I feel somewhat disappointed at its contents, as it has been the wish and object of myself and Council to meet your views and wishes as we were authorized, in all that has taken place respecting the American brig *Creole*; and as our intentions were throughout made known to you previously to being acted upon, without calling forth any objections on your part, we could not but consider that you acquiesced in them. As the statement contained in your letter, respecting what occurred while the Attorney General was on board the *Creole*, does not accord with the official report thereof made to me by that officer, I transmit a copy of the same for your information; and by which it distinctly appears, that neither he, nor any of the authorities here, had any thing to do, either with the negroes quitting the vessel, or their landing here."

In conclusion, the Governor declines giving up the nineteen culprits, because it had been agreed that they should remain until the will of the ministry should be known.

The official report of the Attorney General, dated on the 13th, the day after the slaves landed, states, that on the day before, he had, in accordance with the wishes of the Governor, proceeded on board the brig, in company with the police magistrate, and the Inspector General of Police, for the purpose of visiting her. That on nearing her, he found in her immediate vicinity, several boats filled with colored and black people of the island; that presuming them to be the persons alluded to

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in the communication of the American Consul to the Governor, (of the 12th,) he visited each of the boats, and addressing the persons in them, informed them of the report which had been made by the Consul; explained to them the liability which would attach to them, if they acted in the way it was alleged they intended to do; and strenuously urged them to abstain even from using words or gestures, which might be considered as having a tendency to violate the peace. That, in answer, they all assured him, it was not their intention to resort to any acts of violence, and that they had assembled merely for the purpose of peaceably carrying on shore, such of the persons on board the Creole as might be permitted to quit her, and should desire their assistance. That the persons in the boats were without arms, except ten or a dozen stout cudgels, which he observed in one of the boats, and which, at his request, were immediately thrown overboard. He then proceeded on board, and the police magistrate pointed out to him eighteen persons, who were charged with the crimes committed on board; that one other was afterwards identified by two witnesses. That he then enquired of the chief mate whether he had any further witnesses to produce, and was answered in the negative. That he then requested Lieut. Hill, the officer in command of the military guard, to take charge of the accused, and he, at the same time, informed them, that they would shortly be conveyed on shore, and imprisoned until representations of their case could be made to the British government, &c. That he then informed the chief mate that, as far as the authorities of the island were concerned, all restrictions upon the movements of the other persons on board were removed; and requested him to cause all persons on board to appear on deck. That he cheerfully complied, informing him (the Attorney General), at the same time, that it was not his desire to detain on board any one of the persons (shipped as slaves) who did not wish to remain, and that they had his free permission to quit her, if they thought proper to do so; but that he apprehended that, as soon as the guard should be withdrawn, the people in the surrounding boats would board his vessel, and commit acts of robbery and other violence. To this the Attorney General states that he re-

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plied, that, with respect to the first point, he had no instructions to interfere between himself and the persons alluded to ; but as to his fear of an attack, that precautions had been taken to guard against that ; and that he might rely upon being protected against any violation of law. All the persons on board being then assembled on deck, he says he told them, that, on the arrival of the Creole, information had been laid before the Governor, charging a murder, and certain attempts at murder, to have been committed on board, and that the protection of the authorities had been claimed by the American Consul ; and that a guard of soldiers had been placed on board for the purpose of preventing any person from quitting the vessel, until an examination could take place. That such examination had now terminated, and no criminating evidence had been adduced against the persons he was then addressing. That such being the case, he had to inform them that, *as far as the authorities of the island were concerned, all restrictions on their movements were removed.* He states that he had no sooner concluded, than a white man, who he was informed was a passenger by the name of Merritt, addressed the people who had been shipped as slaves, and told them that they were at perfect liberty to go on shore if they pleased—information which they appeared to receive with great pleasure, and a general intimation of their intention to avail themselves of it. That this took place in presence of the mate, who signified his acquiescence, and refused to forbid the approach of the boats, though urged to do so by the master of another American vessel, who happened to be on board. That he and the police magistrate quitted the brig before any of the slaves had left her, but he was not many yards off when he saw them crowding over the sides and getting into the boats. In conclusion, he states, that the departure of the negroes from the Creole, was their own free and voluntary act, sanctioned by the express consent of the mate ; and that neither himself, nor any other of the colony then on board, interfered in the slightest manner to induce them to take that step. In corroboration of these statements, he refers to the police magistrate, the Inspector General of Police, Mr. Justice Burnsides, Lieut. Hill, the Receiver General and Treasurer, and Mr. Hamilton, the pilot of

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the bar, who were all present during the whole transaction.

This closes the written correspondence, and brings us to consider the parol evidence touching what occurred on the 12th of November, when the guard was withdrawn and the slaves left the vessel. Our attention has been most particularly directed to what was said by the Attorney General at the time in his address to the slaves, and what was said at the same time by Merritt, Gifford the mate, and Capt. Woodside.

The statement made by the Attorney General in his official report, is confirmed by his testimony on oath, and by that of all the other English witnesses who were present. They all testify that he did not tell the slaves they were free and might go where they pleased, but only, in substance, that, so far as it concerned the authorities of the island, all restraint was now removed. They all swear that Merritt, at the same time, told them, in substance, that they might either go, or stay, as they pleased. This is flatly contradicted by the American witnesses, who swear that the Attorney General stated to the slaves that they were free, and might go where they pleased. Merritt, however, admits that he requested the Attorney General to tell them, that those who were so disposed might continue the voyage, which he refused, and that thereupon he (Merritt) said to them: "Men and women, all of you *who think proper* to proceed on the voyage to New Orleans, *have the privilege* of doing so on board the Creole." That something was said or done of that kind, either by Gifford or Merritt, or both, to incur the censure of Captain Woodside, is not denied. Its precise import is not clearly shown, but it is shown, without contradiction, by the testimony of the Attorney General, that Woodside said to Gifford, that he ought to protest against what was taking place; and he swears that Gifford expressed to him his entire willingness that the people should go on shore. Anderson, the Receiver General, swears, that Merritt told them they might go on shore, or wherever they pleased. That he is positive as to this, because Merritt had been standing on the larboard side of the deck with him, and had asked him to tell the people there was no wish to detain them, provided they desired to go on shore; but not having gone on board in any official capacity, he told

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Merritt that interference on his part might be injudicious, and advised him to make known his wishes to the Attorney General and magistrates, then standing on the starboard side of the poop or quarter deck, and that Mr. Merritt immediately passed over to them.

It is to be lamented that the testimony of Captain Woodside has not been taken upon this point; but notwithstanding the positive and irreconcilable contradictions in the statements of the witnesses, there are some facts clearly shown: 1st. That no violence was used on the occasion, and that not a single person from on shore, or the surrounding boats, boarded or attempted to board the *Creole*. 2d. That the four who voluntarily remained, were not disturbed, nor interfered with. 3d. That neither the mate Gifford, nor Merritt, gave any orders to the slaves to go below, or to remain on board when the guard should be withdrawn, nor exerted any authority to prevent the slaves from going on shore when the guard was withdrawn. 4th. That only nineteen were taken on shore by the British guard, with the consent of all concerned.

The declaration, which Merritt admits in his testimony he made to the slaves, that all of them *who thought proper* to proceed on the voyage to New Orleans, had the *privilege to do so on board the Creole*, may have been understood by the remaining slaves as leaving it to *their option* whether to go or to stay, and they were confirmed in that impression when they discovered that neither Merritt, nor the mate endeavored to prevent their going on shore, they not wishing to avail themselves of the *privilege of coming to New Orleans*.

There is another fact equally clear and well established, in our judgment, to wit, that the mutiny or insurrection, which had been successful in turning the *Creole* from her course and bringing her into the port of Nassau, had not been quelled and subdued until the British guard went on board, and confined the leaders. Until then, the mutineers were in the control of the brig, and of every body on board. It is true the arms which had been used to subdue the officers, passengers and crew, had been thrown overboard; but the physical superiority of the mutineers remained, and up to the moment

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when the pilot came on board, they alone exercised authority.

Upon this statement of the material facts of the case, the question arises, what was the cause of the loss, according to the law of insurance? Was it the insurrection or mutiny, or was it the interference of the authorities of Nassau? or, as it is expressed in the policy, foreign interference, or the arrests, restraints and detainments of kings, princes, or people. It is not for us to decide, whether the conduct of the local authorities of Nassau in relation to the Creole, was such a violation of international comity, as to give just cause of complaint in the diplomatic relations of the United States with Great Britain. With the case, in that respect, we have nothing to do. Whether the loss shall fall upon the owners or the underwriters, the question of redress between the two governments remains the same. Our only inquiry is, whether that interference, such as it is shown by the evidence before us, was the proximate, efficient cause of the loss, according to the settled principles of the law of insurance. It is a question between owner and insurer, all citizens of the United States, and equally entitled to the interposition of the government.

When several successive perils have been encountered, and a loss ensues, it is often difficult to determine which is, legally speaking, the true cause. The rule, *causa proxima, non remota spectatur*, is well established; but the *last*, is not necessarily the *proximate* cause. The books are full of cases illustrating this distinction. Where, for example, there had been a restraint and detainment of government within the terms of the policy, and injury to the vessel by the long delay and exposure to the climate consequent upon such detainment, it was held that that was the true cause. "All the consequences," says the court, "naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. If there be a capture, and before the vessel is delivered from that peril, she is afterwards lost by fire, or accident, or negligence of the captors, I take it to be clear that the whole loss is properly attributable to the capture." 1 Story's Rep. 164.

So in the case of *Potter v. The Ocean Insurance Company*, it is said "if a vessel is insured against fire only, and is burnt to

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the water's edge, and fills with water, and sinks, it would be difficult, in common sense, to attribute the loss to any other proximate cause than the fire, and yet the water was the principal cause of the submersion." So the barratry of the master and crew would be the proximate cause of the sinking of a vessel, in which they had bored holes fraudulently to sink her. 3 Sumner's Rep. 41.

In the case of *Schieffelin v. The New York Insurance Company*, as stated in 1 Phillips, 699, it was said by Ch. Just. Kent: "Suppose the policy against capture only, and the vessel was captured, and then shipwrecked while in the hands of the captors, I should think the assured might maintain, that his right to recover for a total loss attached upon the capture, and that the subsequent casualty was one with which he had no concern."

The converse of this last case would be analogous to the one now before us. Suppose the underwriters exempt from the risk of capture, and, after capture, the vessel wrecked by one of the perils assumed in the policy, the assured could not recover. "*Prima facie*," says Hughes, in his treatise, "a capture amounts to a total loss; and if the possession of the captors continues, or even, though a re-capture take place, if the ship be under a disability to complete her voyage, and the adventure be not only retarded, but in effect destroyed, the underwriters will be liable for a total loss, if notice of abandonment be given when necessary. Hughes, 170, *224. 1 Phillips; 419.

In principle it is not easy to distinguish between a successful insurrection of slaves, which form themselves the subject matter of the insurance, and capture by an enemy. If, while the slaves on board the *Creole* were its undisputed masters, and after the route of the original voyage had been abandoned, she had been wrecked upon one of the numerous British islands in that sea, either by the force of a tempest, or stranded intentionally by the mutineers, and they had dispersed themselves on shore, within the exclusive operation of the British law, we cannot doubt that the efficient operative cause of the loss would be the insurrection, which had been successful and unsubdued up to the moment of the stranding or the shipwreck. The escape into a British island, and the immunity promised by the

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foreign law, formed a part of the original plan of the mutineers, and apparently their only motive. The emancipation of the slaves, at least so long as they remained within the dominion of Great Britain, was the immediate and natural consequence of the insurrection, and of the running of the vessel upon the British shores by the mutineers.

But it has been argued that, with the aid of Captain Woodside and others on the island, the officers and crew of the *Creole* might have succeeded in recovering the mastery of the vessel and slaves, and continuing the voyage to New Orleans, had it not been prevented by the interference of the local authorities.

The facts in relation to this part of the case, as stated in the New Orleans protest, signed by the two mates and six seamen, are as follows: "That about two or three hours after the brig reached Nassau, Captain Woodside of the bark *Louisa* came on board with the American Consul, and it was agreed that he, with as many of his crew as could be spared, and the second mate and four sailors of the brig *Congress*, should come on board with arms, and, with the officers and crew of the *Creole*, *rescue the brig from the British officers then in command*, and conduct her to Indian Key, where there was a United States vessel of war. The *Louisa* and the *Congress* were American vessels, and the arrangement was made under the control of the American Consul. The Captain was to come on board the *Creole* with a part of the crews of the *Louisa* and the *Congress*, as soon as the *Creole* was ready to leave Nassau. Frequent interviews were had every day with Captain Woodside, the American Consul, and the officers of the *Congress* on the subject, and the whole plan was arranged. Accordingly, on the morning of the 12th of November, Captain Woodside, with the men in a boat, rowed to to the *Creole*. The muskets and cutlasses were obtained from the brig *Congress*. Every effort had been made, in concert with the American Consul, to purchase arms of the dealers at Nassau, but they all refused to sell. The arms were wrapped in the American flag, and concealed in the bottom of the boat. As said boat approached the *Creole*, a negro in a boat, who had watched the loading of the boat, followed her, and gave the

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alarm to the British officer in command on board the Creole ; and as the boat came up to the Creole, the officer called out to them, 'keep off, or I will fire.' His company of twenty-four men, were drawn up in a line fronting Captain Woodside's boat, and were ready, with loaded muskets and fixed bayonets, for an engagement. Captain Woodside was thus forced to withdraw from the Creole, and thus the plan was prevented from being executed, the said British officer still remaining in command of the Creole."

According to this statement, if the officer in command on board the Creole knew that the intention of Captain Woodside and his party was forcibly to rescue the Creole from the British guard, before the object for which it had been put on board at the solicitation of the Consul, had been accomplished, by identifying and removing the guilty, it might well be questioned whether he had not a right to prevent it, by forbidding their boarding the brig. Up to that moment no complaint had been made of improper interference on the part of the local authorities. That interference, such as it was, had been sought by the Consul, and the mate of the brig. The guard had remained on board, and even prevented the colored people of the island from coming on board, as soon as it was requested to do so. It would hardly have comported with the good faith to have made an attempt at that time, by force of arms, to rescue the brig from the guard. The officer in command that day, swears positively that he was not notified by a negro of the approach of the American boat with arms on board, and that he ordered off all boats, whether American or English, except those which visited the Creole on duty. Be this as it may, neither the failure to purchase arms on shore, in consequence of popular prejudice, nor to rescue the Creole from the guard before the examination had been terminated, can be imputed to the authorities of the island as a cause of the loss of the slaves.

If we consider this abortive attempt to rescue the brig, in connection with the public prejudice of the place, and with the persuasive influence which was employed to induce a great majority of the slaves on board, who had remained apparently passive during the mutiny, to avail themselves of that opportunity of be-

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coming free, and that open demonstration which was made by the colored population, who hovered round the Creole in order to facilitate at least, as well as encourage their escape, if not forcibly to bring about that result, and which evidently intimidated and overawed the officers and crew of the brig; and if we suppose that, under the influence of such intimidation, the slaves were suffered to leave the vessel, the question arises, was that a peril against which the plaintiff was insured, and the cause of the loss?

The policy contains the usual clause of insurance against "arrests, restraints, and detainments of all kings, princes or people, of what nation, condition, or quality soever." "This clause," says Phillips, "is more generally understood to apply to captures, seizures, and detentions by the commissioned officers and agents of some lawful and acknowledged government. Accordingly, Mr. Justice Buller said, the word *people* in this clause means the supreme power, the power of the country, whatever it may be. Thus the court considered the loss of a cargo of corn by a mob at Elly Harbour, as coming under the clause relating to piracy." 1 Phillips, 259. Hughes on Ins., 179.

But not only no force was used, as we have already remarked, but the Governor expressed to the Consul his entire willingness to use all proper means to prevent it; and it is shown that the Attorney General was sent on board the boats, which were assembled near the Creole, and filled with the colored people of the island, and cautioned them against any resort to violence, and caused them to throw overboard a number of clubs with which they had provided themselves. How far the people of the island may have been encouraged, or instigated by persons in authority to aid in the escape of the slaves, does not very clearly appear; that they met with general sympathy, is abundantly shown; but our enquiry is not so much whether the conduct of the local authorities, or people was such as comity and good neighborhood would dictate; but whether their acts and interference were, according to the law of insurance, the cause which prevented the property insured from arriving at the port of destination. Whatever act or event produced that result, is to be considered as the cause of the loss, and that is our

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only enquiry ; and from the best consideration we have been able to give the whole case, we conclude that the insurrection of the slaves was the cause of breaking up the voyage, and prevented that part of the cargo, which consisted of slaves, from reaching the port of New Orleans ; and, consequently, that the defendants are not liable on the policy in this case.

It is, therefore, ordered and decreed that the judgment of the Commercial Court be reversed, and ours is for the defendants, with costs in both courts.

JAMES ANDREWS and another v. THE OCEAN INSURANCE COMPANY.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

This was an action to recover \$3,300, the insurance upon eight slaves, at and from Norfolk to New Orleans, on the brig *Creole*, shipped on the same voyage as those insured in the case of *McCargo v. The New Orleans Insurance Company*, just reported. The same facts and questions of law were presented, as in that case, but the verdict and judgment below, were in favor of the defendants. The plaintiffs appealed.

C. M. Jones and *Roselius*, for the appellants.

F. B. Conrad, T. Slidell, and Benjamin, for the defendants.

BULLARD, J. For the reasons given in the case of *McCargo v. The New Orleans Insurance Company*, it is ordered and decreed that the judgment of the Commercial Court be affirmed, with costs.

EDWARD LOCKETT v. THE FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

This was an action to recover \$20,000, the insurance on twenty-six slaves, at and from Richmond to New Orleans, on the brig *Creole*, shipped on the same voyage as those in the case of *Mc-*

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Cargo v. The New Orleans Insurance Company. In addition to the printed stipulations in the policy, this written clause was inserted: "The assurers are not liable for suicide, mutiny, natural death, or desertion; but to take the risk of interference by foreign governments, or their agents." The facts proved, were substantially the same as in *McCargo's* case, cited above. There was a verdict for the defendants, from which the plaintiff appealed.

Peyton, and *I. W. Smith*, for the appellant. A question arises in this case whether the word "mutiny" shall be taken in any other than its legal sense. The word is strictly confined, as applied to occurrences on ship-board, to the crew and subordinate officers—slaves are incapable of committing a mutiny. See Webster's Dictionary, *Mutiny*. 12 Petersdorff's Abridg. p. 733. Gordon's Dig. p. 745, Nos. 2654-5.

Eustis, also appeared for the appellant.

Lockett, *Micou*, and *R. Hunt*, for the defendants.

BULLARD, J. For the reasons stated in the case of *McCargo v. The New Orleans Insurance Company*, just decided, it is ordered and decreed that the judgment of the Commercial Court be affirmed, with costs.

JOHN HAGAN v. THE OCEAN INSURANCE COMPANY.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

This was an action to recover \$6,500, the insurance on nine slaves, from Richmond to New Orleans. The policy was similar to that sued on in the case of *McCargo v. The New Orleans Insurance Company*, the insurance being on the same voyage, and the facts and questions of law the same. From a verdict and judgment in favor of the defendants, the plaintiff appealed.

Roselius, for the appellant.

F. B. Conrad, *T. Slidell*, and *Benjamin*, for the defendants.

BULLARD, J. For the reasons set forth in the case of *McCargo v. The New Orleans Insurance Company*, just decided, it is ordered and decreed that the judgment of the Commercial Court be affirmed, with costs.

Johnson v. Ocean Insurance Company.—McCargo v. Merchants Insurance Company.

SHERMAN JOHNSON v. THE OCEAN INSURANCE COMPANY.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

This was an action to recover \$15,000, the insurance on twenty-three slaves, at and from Norfolk to New Orleans. The policy was similar to that sued on in the case of *McCargo v. The New Orleans Insurance Company*, the insurance being on the same voyage, and the evidence and questions of law the same. The plaintiff is appellant from a judgment in favor of the defendants.

Roselius, for the appellant.

F. B. Conrad, T. Slidell, and Benjamin, for the defendants.

BULLARD, J. For the reasons given in the case of *McCargo v. The New Orleans Insurance Company*, it is ordered and decreed that the judgment of the Commercial Court be affirmed, with costs.

THOMAS McCARGO v. THE MERCHANTS INSURANCE COMPANY OF NEW ORLEANS.

Where insurance has been effected on slaves shipped from one port to another, the insurers will not be liable where the usual and necessary precaution in providing irons, and in maintaining security, or in the relative numbers of the whites and slaves have not been observed. In such case, the party is left to his recourse against the owners of the vessel.

The seaworthiness of a vessel on whose cargo insurance has been effected, is a condition precedent; and, if not seaworthy at the time of sailing, the policy will not be considered as having ever attached.

An insurance of slaves protects the insured against any loss arising from their mutiny and insurrection, unless that peril be expressly excepted or warranted against. The articles of the Civil Code rendering the owners of slaves liable for their offences and quasi-offences (C. C. 2300, &c.), do not apply to such a case, which is governed wholly by the commercial law.

Where insurance was made on the cargo of a vessel from one port to another, the policy will attach though the cargo was put on board at another place than that named as the port from which the vessel was to sail, where it is the usage for vessels sailing from the port named, to take in their cargoes at the place at which it was actually received on board.

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APPEAL from the Commercial Court of New Orleans, *Watts, J.* This was an action to recover \$15,200, the insurance upon nineteen slaves, at and from Norfolk to New Orleans, shipped on the brig *Creole* on the same voyage as those insured in the case of the same plaintiff against the New Orleans Insurance Company, just decided. The policy stipulates that the defendants take upon themselves the risks of "takings at sea, arrests, restraints and detentions of all kings, princes or people of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses, or misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandize or any part thereof." Appended to this policy is a memorandum, "that the Company are not liable for suicide, desertion or natural death, but that it provides chiefly for the risk of detention, capture, seizure of foreign powers." The evidence established the same facts as were proved in the plaintiff's action against the New Orleans Insurance Company. There was a verdict in favor of the plaintiff for \$14,400, a deduction of \$800 having been made for one of the slaves who had reached New Orleans on the brig.

Peyton, I. W. Smith and Eustis, for the plaintiff.

F. B. Conrad, T. Slidell and Benjamin, for the appellants.

BULLARD, J. This is an action on a policy of insurance upon nineteen slaves, valued at \$800 each, at and from Norfolk to New Orleans, on board the brig *Creole*. The defendants assumed all the usual risks, it being stipulated, however, that they should not be "liable for suicide, desertion, or natural death, but chiefly for the risk of detention, capture and seizure of foreign powers." These slaves formed a part of the cargo of the *Creole*, and were totally lost in consequence of an insurrection or mutiny, as stated in the case of the plaintiff against the New Orleans Insurance Company, just decided.

The defendants, for answer, admit the signature of the policy, but deny all the other allegations in the petition. They deny that preliminary proof was duly furnished, and that the plaintiff has fulfilled the warranties which he was bound to fulfil.

There was a verdict and judgment in favor of the plaintiff, and the defendants appealed.

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We have already expressed our opinion, that the loss was caused by the mutiny or insurrection, and, consequently, that the defendants are liable, unless they have made good some one of the grounds of defence upon which they rely.

It has been argued in this court, that the Creole was unseaworthy, and that, consequently, the plaintiff is not entitled to recover. The unseaworthiness is alleged to consist in neglecting those precautions and that vigilance which the safe transportation of slaves, naturally ready to avail themselves of every favorable chance to liberate themselves, requires ; and particularly in the want of arms on board, and the fact that the slaves must have themselves, brought on board concealed weapons, which they made use of in the revolt.

This question of seaworthiness was expressly left to the jury, and the charge of the judge is before us. That charge was as favorable to the insurers as they could have desired. The jury was instructed that, if they were of opinion that the usual, necessary and proper precautions in providing irons and maintaining security, or in the relative number of whites and slaves, were not observed, it would discharge the defendants, and leave the plaintiff to his recourse against the owners of the vessel. That seaworthiness was a condition precedent, and, if the vessel was not seaworthy when she sailed, the policy never attached, and the defendants are not liable. Under this charge, the jury, with all the evidence before them, found a verdict in favor of the plaintiff, and we are not prepared to say that, in this respect, there was any error.

This point is blended to a certain extent with another, which has been made in the argument in this court, and was also considered in the court below, to wit, that if the loss occurred in consequence of the mutiny or insurrection, it arose from the vices of character of the subject matter of the insurance, and consequently the defendants are not responsible ; that by the Civil Code of Louisiana, the master is himself responsible for the offences and quasi-offences of his slaves ; and that unless the underwriters *expressly* took upon themselves the risk of insurrection of the plaintiff's own slaves, the responsibility arising from such insurrection, and the consequent deviation would

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rest upon the assured, in as much also as it is a well settled principle of the law of insurance; that where a loss arises from the inherent vices of the subject insured, the underwriters are not liable.

Upon these points the court below instructed the jury, that whatever may be the law of France in regard to the liability of insurers in a policy on slaves for the perils of mutiny and insurrection, we have adopted the English law, according to which an insurance on slaves protects the assured against losses arising from mutiny and insurrection, unless that peril be expressly excepted or warranted against; and further, that the articles of the Civil Code creating a liability on the owners of slaves for offences and quasi-offences, does not extend to this case, which is wholly governed by the commercial law.

The judge alluded, probably, to the same French authority which has been cited to us in support of this doctrine. It is a note by Estrangin, upon that part of the work of Pothier on Insurance, in which that author, in allusion to the doctrine that losses which arise from the inherent vice or quality of the subject matter of the insurance do not fall upon the insurers, concludes that when animals, or negroes die a natural death, or even when negroes, through despair, destroy themselves, the insurer is not liable; but that it would be otherwise if drowned in a tempest or killed in combat. Estrangin gives it as his opinion that the revolt or despair of negroes, resulting from the vice or character of the thing, ought in general to be at the risk of the insured; and he explains the decision stated by Emerigon of the *Compte d'Estaing*, by saying that the event was considered to be at the charge of the insurers, because the crew had become so weakened and reduced by contagious diseases that it could not resist the revolt, and the loss might be imputed to the disease, which was a sea risk; and he adds that, in the absence of peculiar circumstances to induce a different judgment, the revolt can only be attributed to the vice of the thing or the fault of the master. Pothier on Ins. 107, No. 66.

The commentary of Boulay Paty on Emerigon, seems to countenance the same doctrine. He remarks, that if the slave trade were not now prohibited by the laws of France, he would con-

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cur with Estrangin in the opinion, that losses occasioned by the revolt of slaves, as well as suicide through despair, ought to be at the risk of the assured, both being attributable essentially to the same cause, and springing from the same motive, the desire inherent in the subject to escape from a state of slavery. 1 Emerigon, chap. 12, sec. 10.

These doctrines, although they are not those either of Pothier or Emerigon, even in relation to the African slave trade, would seem not unreasonable; and if that traffic were not now treated as piratical, and no longer a legitimate object of insurance, might well be adopted as a proper rule. But the commerce between the States of this Union in which slavery is tolerated, rests upon a different basis. It is very different from that trade which is now reprobated by the common voice of Christendom, by which the natives of Africa were reduced for the first time to a servile condition, and when their resistance might be regarded as any thing but criminal.

We are, therefore, of opinion, that the judge did not err in this instruction to the jury.

It has been further contended in this court, that the policy never attached; that the Creole never was at Norfolk, one of the *termini* of the voyage, but that the slaves were taken on board in Hampton Roads.

This was not made a special matter of defence in the court below. If it had been we do not doubt but that it might have been shown to be an usage of that trade, for vessels to take in their cargo on a voyage from Norfolk at Hampton Roads. We infer this from the expressions of several witnesses, who speak of the Creole as having sailed from Norfolk, when in fact she sailed from Hampton Roads, which is rather an extension of the harbor of Norfolk. Upon this point, therefore, we think the verdict ought not to be disturbed.

Our opinion has already been expressed that the loss was occasioned by the insurrection, which, according to this policy was a risk assumed by the defendants, and, consequently, the plaintiff is entitled to recover.

Judgment affirmed.

(See opinion on application for a rehearing, post, p. 349.)

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EDWARD LOCKETT v. THE MERCHANTS INSURANCE COMPANY OF NEW ORLEANS.

Where a vessel on whose cargo insurance has been effected, stops, in descending a river, at different places, for the purpose of taking in further cargo or passengers, such stoppages will not amount to a deviation, when proved to have been conformable to the usages of the trade, and of no unusual length.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

This was an action to recover \$10,000, the insurance upon fifteen slaves, valued equally, at and from Richmond to New Orleans, shipped on the brig *Creole*, on the same voyage as those insured in the case of *McCargo v. The New Orleans Insurance Company, ante p. 202*. The answer admitted the signing of the policy; denied generally the allegations of the petition; and specially denied that preliminary proof had been furnished, and that plaintiff had complied with the warranties, which he was bound to fulfill. The policy provides that the company take upon themselves the risks of "takings at sea, arrests, restraints, and detainments of all kings, princes, or people of what nation, condition or quality soever, barratry of the master or mariners, and all other perils, losses, or misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandize, or any part thereof, to which assurers are liable for." A memorandum appended to the policy declares, "the company not liable for suicide, desertion or natural death, but liable for risks of emancipation, detention, or seizure by foreign powers." The evidence establishes the same facts as were proved in the case of *McCargo v. The New Orleans Insurance Company*. The Log-book, which was offered in evidence, shows the following entries:

"Log Book. Remarks on board the brig *Creole*, Capt. Robert Ensor, from Richmond bound to New Orleans. Cargo, tobacco; two cabin passengers, and 150 slaves.

Remarks—Monday, Oct. 25, 1841.—All this day clear and cold, at midnight left Richmond in tow with steamer *Ben Sheppard*. Ends this day.

Remarks—Tuesday, Oct. 26, 1841.—All this day fresh gales

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from S. W. and clear wr. At eight A. M. cast off from the steamboat, and made *sail* at ten A. M. Came to anchor at Minse's at one P. M. Got under way and worked down the river. At nine came to anchor at Hog Island. So ends this day.

Remarks—Wednesday, 27th Oct. 1841.—All this day light breezes from S. E. and clear. At six A. M. got under way and worked down the river. At six P. M. came to anchor at Day's Point. Put Captain Ensor on board the steamboat for Norfolk, and took three negroes on board. So ends this day.

Thursday, 28th Oct. 1841.—All this day fresh breezes from S. E. At noon got under way. At five P. M. came to anchor at Newport News. Capt. Ensor came on board with thirty-three negroes. So ends this day.

Friday, Oct. 29, 1841.—All this day fresh breezes from east, and some rain. At one got under way. At four came to anchor at Sewel's Point. So ends this day.

Saturday, Oct. 30th, 1841.—All this day, light, variable winds. At eleven A. M. got under way, and worked down the bay. At eight P. M. came to anchor in Linhaven Bay, in company with brigs Orleans and Long Island, and several other sail. So ends this day.

Sunday.—Nothing of importance. Got under way and proceeded to sea. Winds S. E. etc."

It appears from the protest made at New Orleans, which was introduced in evidence by the plaintiff, that after leaving Richmond, "the brig proceeded to Hampton Roads, and lay there one day, when about eight slaves were put on board by Mr. W. W. Hall for Mr. Hatcher, two by Mr. C. H. Shield, and twenty-three for Mr. Johnson, making the whole in number one hundred and thirty-five."

Ensor, the master of the Creole, deposed, that some of the slaves were taken on board after leaving Richmond, "two miles below in James river," and "that two or three of McCargo's slaves were put on board about one hundred miles below Richmond." He further stated, that "he went in a steamboat from James river to Norfolk."

There was a verdict and judgment for the plaintiff for \$9,333 33, the sum of \$666 66 being deducted as the value of

one of the slaves, admitted to have reached New Orleans in safety. The defendants appealed.

F. B. Conrad, T. Slidell and Benjamin, for the appellants.

I. The vessel deviated in that part of the voyage performed between Richmond and the Atlantic Ocean, and thereby all claim under the policy for any subsequent loss was forfeited. See the log-book, from 25 to 31 October.

It appears by the testimony of Gifford, in corroboration of the log-book, that the captain *left* the brig in the river on the 27th October, and proceeded to Norfolk by the *steam-boat*; the Creole was *detained* in *Hampton Roads* one day, where she took in the balance of the slaves. The protest made at New Orleans, and the other evidence confirm these statements. The circumstances thus established, amount to a deviation, and absolve the insurers from further liability. "Deviation," says Hughes, p. 139 (183), "signifies a departure without necessity or justifiable cause from the usual course or line of the voyage. Thus if a master touch at a port for a purpose not connected with the voyage, or touch at a port not in the course of the voyage, though only a few leagues out of the way, or *touch at a port at which it is not usual to touch, although one by which the ship must necessarily pass, or stay an unusual time*; or if, when there are several courses or modes of performing a voyage, the master select a particular track for a purpose foreign to the object of the voyage, instead of adopting that which is the safest and most eligible, considered merely with reference to the voyage insured; or if, *having liberty to touch at one port, he touch at another*, or touch at a place mentioned in a liberty, but for an unauthorized purpose; this departure from the course prescribed by usage and the terms of the policy is, in such case, a deviation, and absolves the underwriters from further liability. The criterion to distinguish between a change of voyage and a deviation is, whether the *termini* of the voyage are preserved or not."

"If the vessel touches or trades at intermediate ports in the course or track of the voyage, she deviates only, but does not desert the voyage. The question of deviation turns on that distinction." 1 Hall's Sup. C. Rep. 369. 2 Caines, 274.

"The effect of a deviation is *not always to increase the risk*, its effect is to *vary* the risk; and as it attempts to introduce a new responsibility instead of that to which the underwriters agreed, it discharges them from further liability. And whether the insurance is on ship, goods or freight, whether the insurers are *privy* to the deviation or not, or *from whatever cause a loss which happens afterwards may arise, a deviation is equally fatal*."

The only right of stopping given in the policy is, if thereto obliged by stress of weather, or other unavoidable accident. This is, in fact, in accordance with the well recognized principles of insurance laws. A deviation (and a stoppage is a deviation) can only be justified either by necessity, or by well established usage. Park on Insurance, 400, 401, 411.

Without attempting to overthrow these principles, the plaintiff sets up no other excuse than this: that from the course of James River, and the geographical position of the various points, taken into consideration with the state of the winds, as shown by the log-book, and the ebb and flow of the tides, the stoppages were *necessary*, and must be so supposed.

This apology will not stand the test of scrutiny.

Thus, during the whole of Oct. 26, 1841, there were fresh gales from the S. W. At eight A. M. they cast off from the steamboat and came to anchor at ten A. M. of the same day. As the wind was the same, their anchoring could not be attributed to an unfavorable wind.

On the 27th Oct.—*All this day*, light winds from the S. E. and they got under way at six A. M. How is it, if their stopping that day was owing only to unfavorable wind and tides, that we find the singular coincident circumstance of the captain going on shore, and negroes being taken on board at that very point.

Common sense must attribute the stoppage to the desire of transferring the captain to another conveyance, and of taking in, pursuant to a preconcerted arrangement, a portion of the cargo engaged to be received at that point.

Again, on the 28th Oct.—*All this day fresh breezes from the S. E.* How is it, that with the wind unchanged, it was necessary to come to anchor at 5 P. M. at Newport News? The answer is obvious; it was here that, by preconcerted arrangement, Capt. Ensor was to embark, as the log-book shows he did, thirty-three negroes.

Again, on Oct. 29, 1841.—*All this day* fresh breezes from the east. Why, with the same wind, was it necessary to come to anchor again?

Again, on the 30th, more slaves are taken on board, (See Gifford's evidence,) and we are not informed by the testimony, whether, without this cause of delay, and the absence of the captain, the vessel might not have proceeded to sea.

The unprejudiced mind must, we think, be satisfied, that, without the delay occasioned by the repeated stoppages to take in cargo, and the absence of the captain, the Creole, which departed from Richmond on the 25th Oct. (See Gifford's evidence), would have got to sea before the 31st Oct. Will any one pre-

sume to say, that the risks of the river and of the sea, to which she was exposed, the risks of wind, weather, and others, were the very identical risks to which she would have been exposed if these delays had not been incurred. Whether the risks were enhanced or diminished, is immaterial; it is enough that *they were not the same*.

But again, if it should be suggested that one of these stoppages—that at Hampton Roads—was justified by the fact of our insuring negroes from Norfolk for Mr. McCargo, this excuse as to this particular stoppage will be found untenable; for the vessel did not stop at Norfolk, *at and from which* certain slaves were insured, but at Hampton Roads, and slaves were there taken on board. Norfolk is one place; Hampton Roads is another place. Norfolk is a port; Hampton Roads a roadstead. The one is nine miles from the other. The course of a vessel sailing from Richmond *via Norfolk* to the sea, would be materially different from the course of a vessel sailing from Richmond to the sea, *via Hampton Roads* only. This is obvious from a glance at the map.

Now if it were possible to consider the fact of this company having insured other slaves of another party “at and from Norfolk,” as tantamount to an express stipulation that the vessel might stop at Norfolk, yet even an authority to stop and take in cargo at Norfolk, would not justify a stoppage and taking in of cargo at Hampton Roads, even though Hampton Roads were a *safer* place than Norfolk, which is not proved, and which no one can suppose, and even although it be a *shorter* route to New Orleans than *via Norfolk* itself. See Hughes on Ins., 140 (183).

To test this question in another form, let us enquire whether slaves insured in a policy *at and from Norfolk*, which is the case in McCargo's policy, would be covered, if not laden on board at Norfolk, but at Hampton Roads. Let us concede, if the plaintiff desire it, that on a voyage from Virginia to New Orleans, Hampton Roads would be nearer to New Orleans than Norfolk. Let the question be answered by the following decisions, two of them rendered by one of the great lights of insurance law, Lord Mansfield; another by Judge Thompson, then of the Supreme Court of New York, and afterwards of the Supreme Court of the United States.

In the first case, *Constable v. Noble* (2 Taunton 402), it was decided that, a policy at and from a place, the name of which equally designates a particular town, and a port comprehending an extensive district of coast, does not protect a cargo laden anywhere within the limits of the port, but refers to the town itself.

In *Payne v. Hutchinson* (2 Taunton, p. 404, *in note*), it was de-

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cided that if a policy describe a voyage at and from a place which is the head of a port, it will not cover a voyage at and from a distinct place, which is a member of the same port.

In the case of *Murray v. The Columbian Insurance Company*, (4 Johnson, 443), a vessel was insured *at and from Calcutta*, to New York, with liberty to *touch at Madras* for trade, and to take in part of her cargo there. The vessel went to Madras, and sailed thence direct to New York, without even going to Calcutta. In an action brought by the insurer to recover back the premium, it was held that the voyage insured did not commence; and that as *the policy never attached*, the insured was entitled to a return of premium.

In deciding this case Judge Thompson observed, in refutation of the argument of counsel, which was, though he could not go first to Madras, and then to Calcutta, he might come home direct from Madras, *for it shortened the voyage*, and greatly diminished the risk, that "*whether the risk was increased or diminished*, by the ship's not going to Calcutta, may be uncertain; it is enough that the parties *have, by their contract, designated that as the place where the risk is to commence*, and it is not competent for the court to substitute any other in its stead."

Peyton and I. W. Smith, contra.

The appellants contend that there was a deviation before the Creole got to sea. To determine what facts amount to a deviation, the great principle of indemnity is to be constantly kept in view as the basis of the contract. Allowance must be made for the delay usual for the purpose of taking on board the cargo, and for every other act of preparation which may be fairly supposed to be done in view of the object and scope of the voyage. Such detentions, whether they be to obtain a full cargo, or to obtain passengers, or to complete the outfits, are considered as the incidents of every sea voyage, and as properly left to the discretion of the master and owners of the vessel.

Especially should allowance be made for such delays and hindrances, when they occur in river navigation, which, from its nature, is subject to so many interruptions and detentions not to be encountered in open sea. The whole doctrine of deviation is only applicable to a vessel which has completed her cargo, made all her preparations for the voyage, has actually taken her departure from port, and has spread her canvass upon the open sea. Nor can it be said that this view of the law leaves too much latitude to the insured. The other rule, that the voyage must be commenced within a reasonable delay after the policy is effected, and must be prosecuted with reasonable despatch and diligence, is amply sufficient to protect the rights of

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the underwriter, as to all the detentions and delays incident to the fitting out and departure of the vessel.

The petition of the plaintiff sets out fully the grounds on which he relies for a judgment upon his policy. The answer of the Company, after pleading a general denial, denies specially that the preliminary proof has been duly furnished, and that the plaintiff has fulfilled the warranties which he was bound to fulfill. Thus no notice was given by the answer that the detentions of the river, or the manner and places of taking the slaves on board, would be relied on to establish a deviation, or a different voyage, and thus avoid the policy. The evidence having been received without objection, must of course be judged according to its legal effect; but is it not a fair rule of evidence, that the defendants are bound to show much more clearly the facts to establish the alleged deviation, than if they had, among their special denials, directly called the attention of the plaintiff to the subject, and thus put him on his guard? The plaintiff was kept equally in the dark in the taking of the immense mass of testimony which encumbers the record. A single commission was taken out by the Company, and, at great expense, many witnesses were examined, but nothing in the interrogatories bore the slightest relation to this alleged river deviation.

In the rigid and severe cross examination of our witnesses, not a question was propounded, nor an intimation thrown out, of any thing like river deviation. Neither during the trial, nor up to the moment the charge was delivered to the jury, had the river deviation been conceived. The only question of deviation arose from the occurrences of Sunday night, the 7th of November. The river deviation was not alluded to until the argument in this court.

Gifford, in his examination in chief, referred to the log-book to refresh his memory as to the precise position of the brig on Sunday evening, and as to the dates, whereupon the log-book was annexed as a part of his deposition. It was referred to for no other purpose, nor was it supposed material to his examination for anything else. But the entries are now relied upon to make out a deviation. Let us see what they establish.

It appears by the log-book, that on Monday, at midnight, the Creole left Richmond in tow of the steamer Ben Shephard, and that she continued in tow of the steamer until the next morning at eight—a period of eight hours—when she cast off from the steamer, and made sail, with fresh gales from the south west, but that she stopped from 10 to 1 o'clock at Minn's, and then worked down the river till 9, when she reached Hog Island and anchored for the night.

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It appears also from the log-book, that on the next morning they got under way at 6, and worked down the river to Day's Point, which they reached at 6, P. M., and, the breeze being light and from the south-east, they came to anchor. The next morning the wind had become stronger, and was from the same unfavorable direction. They however got under way at noon, and were enabled to reach Newport News, where they anchored at 5, P. M. The next day the wind continued fresh and easterly, and it rained; they did not get under way until 1, P. M., and reached Sewell's Point at 4, when they anchored for the night. The next day the wind was light and variable, and they did not get under way until 11. They worked down the bay, and anchored at 8, P. M., in Linhaven Bay, in company with several brigs and other vessels.

Captain Ensor, left the vessel at Day's Point, on Wednesday evening, for Norfolk, and returned on board the next day, at Newport News. It appears that three slaves were taken on board at Day's Point, and thirty-three at Newport News. There appears nothing singular in these facts, for the brig had been receiving the slaves from the 20th of November.

These are all the facts proved as to this river deviation. The depositions of the witnesses state some of the facts in different words, but it is in substance the same; nor can the defendants eke out the testimony by resorting to matters *dehors* the record.

It is argued that on the 30th, slaves were also taken on board. We apprehend that the idea is entirely erroneous, and that the record affords not a scintilla of evidence in support of it.

Whether the fact of the brig coming to anchor at the different places, as she did, was caused by the ingress of the flood tides, or by unfavorable winds at the particular places of anchoring, or by reason of it's not being safe to proceed at night, does not appear. In the various windings of the narrow channel of a shallow river, delay is often necessary, to wait for a wind different from that which is favorable according to the general course of the stream.

If any doubt can arise from the statements of the log-book as to whether there was a deviation, the other evidence will remove it. The Company sign one policy in favor of McCargo, from Norfolk, on the 17th November, and on the next day they sign the other policy in favor of Lockett, from Richmond; both policies being for slaves laden on board the same vessel, and on the same voyage to New Orleans. The only reason for not commencing the risk on McCargo's policy from Richmond, in the same manner as on Lockett's policy, is found in the evidence of Capt. Ensor, who proves that two of the slaves were actually put on board the brig two miles below Richmond. Hence Norfolk

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was inserted as the point from which the risk should commence, for if Richmond had been inserted it might have created all difficulty in relation to those two slaves.

The testimony of the witnesses who were examined, proves that there was a strict compliance with the usages of the trade. It thus appears that it is the custom for vessels starting from Richmond to bring a cargo of slaves to New Orleans, to complete their cargo at other points down the river, especially at Norfolk. It also appears to be the usage, that, for all the purposes of the voyage, being opposite the city of Norfolk in or near Hampton Roads, is considered as being at Norfolk, for the purpose of conveying slaves to New Orleans, though a steamboat is employed to bring them to the vessel.

Hughes describes a deviation as taking place, if the vessel "touch at a port where it is not usual to touch, or stay an unusual time;" by which he clearly intimates that the vessel must either go out of her usual course to touch at a place after the voyage is commenced, or, if it is usual to touch there, the stay must not be for an unusual time. Has either fact been proved here?

The case of *Payne v. Hutchinson*, only decides that a policy on a voyage from one port, does not protect goods shipped from another port in the same custom-house district.

The case of *Constable v. Noble*, decided by the same judge, turned upon the same point. That case differs from this, in the following particulars:

The point was expressly made before the jury, and testimony proving all the facts, was received on both sides.

In that case Lord Mansfield said: "If the plaintiff in this case could have proved a usage for ships to load at Bridgport, on a policy at and from Lyme, it might have assisted him; but no usage was proved here. Probably the underwriters never *underwrote a voyage from Bridgport in these terms. The whole is obviously a mistake,*" &c.

It was proved that, though by an air line Bridgport was a few miles nearer to London, and that a vessel, in going from Lyme to London, had to cross the bay on which Bridgport was situated, it could not be said, owing to the different courses it was necessary to take to double Portland Bill, that from Bridgport it would be the easiest or quickest route.

In that case it was decided that the policy never attached, because the parties were evidently mistaken as to the voyage insured. They both believed at the making of the policy, say the court, that because one vessel insured by the same policy was to make the voyage from Lyme to London, therefore the other vessel was to pursue the same voyage. Such an insurance was never before made. But here the insurers, in the brief space of twenty-four hours, issue both policies upon similar

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property, at the same rate of premium, on the same vessel, and on the same voyage, an intermediate port being taken for one of them as the commencement of the risk! If the argument of the defendants were good, what would become of policies from Pittsburg and Cincinnati to New Orleans, on the same boat and the same voyage?

Two other cases relied on by our opponents are equally significant. The vessel insured from Liverpool to London, had to go at least sixty miles out of her way to get to Loo; and the vessel bound from Dunkirk to Leghorn had to cross the English channel to reach Dover. This was, in each case, in direct violation of the usual course of the voyage. How far did the Creole go out of her way, and what channel, bay or river did she cross?

They also rely on *Murray v. Columbian Insurance Company*. In that case the policy was annulled, because the vessel had, instead of commencing the voyage at Calcutta, the *terminus* of the policy, commenced it at Madras—five hundred miles distant.

It is evident that the facts proved do not in any manner affect the liabilities of the underwriters. They know and are bound by the usages of the trade, in the transportation of slaves from Richmond and Norfolk to New Orleans. Having taken risks from each of those ports, on the same voyage, they have recognized those usages at the making of the contracts.

Eustis, also appeared for the plaintiff.

BULLARD, J. This is the last of the Creole cases, and is an action on a policy upon fifteen slaves, "at and from Richmond to New Orleans."

The grounds of defence common to this and the other cases, have already been considered; and the only one peculiar to the present case is an alleged deviation in descending the James River, and coming to anchor in Hampton Roads.

We are by no means satisfied that the evidence shows such a deviation in the usual voyage from Richmond, as to authorize our interfering with the verdict of the jury.

Judgment affirmed.

(See opinion on the application for a re-hearing—post, p. 349 et seq.)

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THOMAS McCARGO v. THE MERCHANTS INSURANCE COMPANY OF NEW ORLEANS—EDWARD LOCKETT v. THE SAME.—APPLICATION FOR A RE-HEARING.

F. B. Conrad, T. Slidell, and Benjamin, for a re-hearing. The court has recognized the principle that, under a policy on slaves, the assured will be answerable for a loss by insurrection; but an unexpected exception has taken our case out of the general rule. It is alleged as the main ground for not applying the principles “which the court has recognized as not unreasonable” and which might well be adopted as the proper rule, that there is a difference between our coasting slave trade and the foreign slave trade. It is not stated in what this difference consists. The court can have contemplated but two points of difference.

First, In the light in which the jurisprudence of this country would regard these two trades, did both now legally exist; and secondly, a difference in the disposition of the slave to revolt.

1st. Is there any difference in the light in which the jurisprudence of this country would regard these two trades, did both now legally exist?

To simplify this inquiry, let us carry our minds back to the time when the foreign slave trade was tolerated by our laws.

Suppose the *Creole*, an American vessel, was navigating, before the year 1808, the waters of the Atlantic, on a voyage from the coast of Africa to Norfolk, laden with newly captured slaves.

Would the voyage be deemed an unlawful one? Assuredly not; the terms of the constitution itself sanctioned it. “The navigation or *importation* of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808; but a tax or duty may be imposed on such importation, not exceeding two dollars for each person.”

Would not the *Creole*, in the supposed case, be just as much under the protection of the United States, as on her late voyage in 1841? Assuredly she would have been. If captured without just cause, by a vessel of war of a foreign nation at peace with us, would not the United States have been bound to claim indemnity? If unjustly detained or disturbed by such a vessel, would not the United States have demanded an apology or reparation? See *Madrazo v. Willes*, 3 Barn. and Ald. 315, 316, in which the King’s Bench uses the following language:

“Most of the states of Christendom, have now consented to

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the abolition of the slave trade, and concurred with us in declaring it to be unjust and inhuman. The subjects of any of *these* states, could not, I think, maintain an action in the courts of the country, for any injury happening to them in the prosecution of this trade; but Spain has reserved to herself a right of carrying it on in that part of the world where this transaction occurred. Her subjects could not legally be interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this country for any injury sustained by them from such an interruption."

"These principles are confirmed by the decisions of the Court of Admiralty, and also by a judgment of Sir William Grant, pronounced at the cock pit. The cases to which I allude are, the *Fortuna*, the *Donna Marianna*, and the *Dianna*, in the Admiralty Court, and the *Admedic*, before the Privy Council.—*Dodson's Ad. Rep.* 81, 91, 95. These cases establish this rule, that ships which belong to countries that have prohibited the slave trade, are liable to capture and condemnation, if found employed in such trade; but that the subjects of countries which permit the prosecution of this trade, cannot be interrupted while carrying it on. It is clear from these authorities, that the slave trade is not condemned by the general law of nations. The subjects of Spain have only to look to the municipal laws of their own country, and cannot be affected by any laws made by our government."

When the learned Mansfield was called upon as Chief Justice of the King's Bench, in the case of *Jones v. Schmoll* (1 T. R. 130,) to say who should bear the loss of slaves slain or mortally wounded, in an insurrection, from which wounds they subsequently perished, he did not institute any distinction between the direct and foreign trade from Africa, and the domestic trade between the British Colonies. Both were equally legal. He looked only to the contract, and because the written terms of the memorandum of the contract imposed the loss on the underwriters, he made the underwriters liable. By the policy in that case it was expressly declared, that the underwriters should pay for loss by mutiny, if it exceeded ten per cent. And his Lordship said, this policy is in the common form, *and if it were not for the memorandum I should say the case was not within the instrument.* But as it now stands, it is clear that those who were killed by the firing, or died in consequence of their bruises, are within the policy, and hence, under this instruction, the verdict was:

That all the slaves who were killed in the mutiny or died of their wounds, were to be paid for.

That all those who died of the bruises which they received

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in the mutiny, though accompanied with other causes, were to paid for.

But the court seems to imply in its opinion, that the real test of distinction is this, viz: that in the foreign slave trade "the resistance of the captive might be regarded as any thing but criminal," whilst, as a converse proposition, the court seemed to assume that this resistance is criminal in the negro born in a state of slavery.

Now, if we concede this point to the fullest extent, we are utterly at a loss to conceive how this concession of fact can operate to fasten upon us the responsibility to which the decision of the court has subjected us.

Why are insurers, in the absence of express assumption of the risk, liable for criminal acts of a slave, who is the subject matter of insurance? Crime cannot exist without criminal motive. How can the human mind conceive of a loss proceeding more plainly and directly from a vice inherent in the subject matter, than one which is admitted to have originated from an act prompted by criminal motives in the being that is the subject matter of the insurance?

In the foreign slave trade, as it is admitted by the court, the spirit that would prompt the negro to revolt is an inherent cause of loss, for which underwriters are not responsible. In the domestic slave trade, is this cause less *inherent*, because *criminal*? How can the morality or legality of the act affect the enquiry as to its *origin*—as to its being an intrinsic or extrinsic cause of loss?

Let us now consider the next supposed point of difference, viz: a difference in the disposition of the slave to revolt.

Let us concede, for the purposes of argument, that the disposition of the slave to revolt and to obtain his liberty is stronger in the case of the new made slave, than in the slave who is born so, or who has long been in that condition. Still it cannot be pretended that the desire of liberty is extinguished in the latter. All experience demonstrates the contrary. The statute book of every slave-holding State in this Union rebukes such a pretension. Is all the legislation of Louisiana with regard to the police of our slave population, an idle legislation, based upon visionary apprehension, upon unmanly and unreasonable fear? Certainly not. The passionate desire for liberty exists in the bosom of of *every* slave—whether the recent captive, or him to whom bondage has become a habit, or was his destiny from birth. It is then a mere difference of *degree*.

But the very moment that the loss actually happens from the inherent cause, whether the cause exists in a more or less violent degree, the result of the application of the legal principle

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must of necessity be the same. Fruit shipped when green, may be less liable to rot, and thus to loss from inherent causes, than if shipped when ripe; yet that fact would scarcely be regarded by a court as furnishing a basis for distinction in an enquiry as to the liability of insurers. Negroes born free may be more ripe for revolt than negroes born in a state of slavery, and still if the revolt does actually take place, it really seems to us that no sound distinction can be made as to the result on the policy of insurance.

Does the decision of the court then rest upon a solid and substantial legal basis? What is the rule which the decision sanctions? It is an arbitrary rule and is this: In the case of the newly captured slave, it is reasonable to throw the loss arising from an insurrection upon the assured, because his desire for liberty is very great. In the case of the slave long habituated to bondage, it is reasonable to throw the loss arising from an insurrection upon the underwriter, because the slave's desire for liberty is not so *very* great. If this contract then had been upon an African voyage, and such a voyage were now legal (as it was before 1808), we should throw the loss upon the owner; but as it is upon a domestic voyage and traffic, the loss must fall upon the underwriter.

We respectfully hope that the court will pause before it incorporates so loose a rule in the law of insurance, a system justly celebrated for its refined equity and logical accuracy, and to which the recent learned decision of this court, in the case of the Orleans Insurance Company, has made so valuable a contribution.

The points were expressly made in the printed brief, that the policy at and from Richmond, if it ever attached, was forfeited by deviation, before the Creole reached Abaco and the insurrection occurred; and also that the policy from Norfolk never attached, because the negroes insured were not laden on board there.

We supported both these points by authorities which we believed, and still believe, are clearly pertinent. The court seems to waive the application of these authorities to the present cases, upon the ground that these points were not argued in the court below; and that, if they had been, the plaintiff might have cured the difficulty by proof of usage. This might be a reason to remand these causes; but not, we respectfully submit, to repel the discussion altogether, and conclude the defendants.

Deviation need not be specially pleaded; the non-lading at the proper port need not be specially pleaded. Both may be set up under the general issue. Of this there can be no doubt. See Hughes on Insurance, p. 360. "When the action is framed

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in assumpsit, on a policy not under seal, the plea of the general issue will in general enable the defendant to avail himself of any matter of defence, either arising from illegality of the insurance, from an alteration of the policy after its execution, from a non-compliance with some express or implied warranty or condition, from the want of interest—a misrepresentation—a *deviation* or otherlike cause, from a release, or from a performance on his own part of the terms of the policy. But some matters of defence, which are not favored in law, must be specially pleaded—such as the insured becoming an alien enemy after the making of the contract or bringing the action; or the statute of limitations, when the action is not brought till after the lapse of six years.”

What was the course of these proceedings and of the trial? The general issue was joined. The plaintiffs themselves offer evidence clearly establishing deviation in the one case, and, in the other, the non-lading of the slaves at Norfolk. The plaintiffs having themselves thus produced this testimony, we are debarred from all advantage to be derived from it, simply because, after the testimony was closed, we did not raise the point before the jury. Is the opinion of a jury conclusive upon such a point? If they had found the point either for us or against us, would this court have been absolutely concluded by their verdict? Above all, is this court prepared to sanction the rule, that a point presented by a party's own testimony, can never be raised by his antagonist in this court, unless it was first raised in the court below? If such is to be the rule, so let it be; the bar will deferentially submit; but we are not aware that this court has ever so declared, in any other case.

Lastly. The point was expressly made by the defendants, that two of McCargo's slaves covered by the policy, viz: Rachael Glover and Mary arrived in safety at New Orleans, and were not lost. This is established by the evidence of Merritt. This point, in the discussion of much more important matters, has perhaps escaped the attention of the court. Allowance was made by the jury for one slave only. An additional allowance of \$800 should be made.

BULLARD, J. In these cases a petition for a re-hearing has been presented, which we have attentively considered; the more so, as we desire not even to appear to innovate, in any thing which relates to the contract of insurance.

The counsel have not correctly understood us, if they suppose we meant to make the difference between the African slave trade, as it once existed, and the commerce between the State

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of this Union in slaves, to consist in the desire, in a greater or less degree inherent in such persons, to escape from restraint and become free. We cannot but think there was a great difference between the two, when the slave trade was tolerated by the law of nations. The natives of Africa were guilty of no crime, when they resisted the attempt of the slaver to subject them to a servile condition. Under the constitution of the United States, slaves in those States where that institution, slavery, is permitted, are legitimate property, and if the mutineers on board the *Creole* had escaped into a non-slaveholding State, the master might have reclaimed them, and they might have been punished for the murder committed on board. A small part only of the slaves on board appear to have been engaged in the mutiny. Now, however plausible it may appear to apply to those few, the principle which relates to the natural decay or self-combustion of the subject matter insured, we do not clearly perceive how it can apply to the others who remained passive. On the contrary, we think, their forcible resistance to the authority of the master of the vessel on the voyage, was a peril within the policy.

Admit that under the plea of the general issue, in an action of *assumpsit* at common law, the enquiry might be gone into, whether there had been a deviation, and whether the policy ever attached, it only follows that evidence was admissible without any special defence. No evidence on either of these points was offered and rejected; and from the evidence before the jury we are not authorised to pronounce that the verdict was so clearly wrong, as to justify our interference.

If the slave *Mary* was one of those insured, and she arrived safe, the title to her vested in the defendants by the abandonment; and if she has in fact been retained by the plaintiff, the defendants' right to recover her, which is left doubtful, ought to be, and is hereby reserved.

It is, therefore, ordered, that the judgment first rendered, with the above reservation, be maintained, and the re-hearing refused.

JAMES FLOOD v. JAMES FLOOD.

APPEAL by the plaintiff from a judgment of the District Court of the First District, *Buchanan, J.*

Crawford and McHenry, for the appellant.

McCarty and Haynes, for the defendant.

BULLARD, J. This suit was at first brought upon an account for one half of certain jobs of paving done by the parties on joint account, and for a number of days work during the years 1838, 1839, 1840 and 1841. The defendant having excepted that the petition showed a partnership between the parties, and that a settlement of the same was not demanded, but judgment for a particular sum, the plaintiff amended his petition and prayed for a settlement of the partnership concerns, and for a judgment for the balance due him, and also for his labor as a workman on jobs not undertaken in partnership.

The defendant for answer put in the general denial, and a want of amicable demand. With respect to the last plea, it is enough to say that numerous demands are proved before the plaintiff brought suit.

Upon the merits, the defendant has chosen to rely upon the general denial, and it is clearly disproved by the evidence. It is shown that the plaintiff entered into a contract with the Second Municipality for paving, to the amount of \$9000. That the defendant became his surety upon condition that he was to receive the money, and to become jointly interested in the contract. He did receive the whole amount, and it is shown that the plaintiff himself worked on the job. The defendant has rendered no account showing disbursements made by him on account of the partnership. If the disbursements made by the defendant, in pursuance of the contract with the Second Municipality, were of a greater value than the labor of the plaintiff, it was for him to show it, in rendering account of the fund in his hands belonging to the partners. The District Court gave judgment for one-half of the supposed profits of the concern, and assumed the amount of the profits to be \$4000. This sum is mentioned by the former bar-keeper and book-keeper of the

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defendant, as the nett profits according to the admissions of the defendant. The witness said, he had heard the defendant say, *he* had cleared \$4000 by the contract. The plaintiff having shown that the defendant received partnership funds to the amount of \$9000, and that the work was done by himself, we know of no principle of law which raises a presumption, in the absence of any proof, that one of the partners made all the disbursements. The plaintiff is entitled, undoubtedly, to one-half of the fund not shown to have been expended in the performance of the contract, besides an allowance for his own labor. But the defendant has chosen to render no account, to give no satisfaction, to show no expenditures over and above what were made by the plaintiff. Under those circumstances, we think, the plaintiff entitled to recover one-half of the partnership fund.

Upon the other parts of the case we concur with the court below in the opinion that the evidence is too vague to authorise a recovery.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that the plaintiff recover of the defendant \$4500, with interest at five per cent from judicial demand, and the costs in both courts.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

Benjamin and Micou, prayed for a re-hearing in this case.

BULLARD, J. It is ordered that the judgment rendered in this case be so amended, as to reserve to the defendant his right, if any he has, to recover in a separate action such disbursements as he may have made, in relation to the paving contract with the Second Municipality, over and above the expenditures or value of the services of the plaintiff; and that, in other respects, the judgment remain undisturbed.

ANNA MARIA LINTON v. PIERRE ALEXANDRE GUILLOTTE.

Though no particular form is required for the dedication of land to public use, the positive assent of the owner, and the fact of its being used for the public purposes intended by the appropriation, must, at least, be shown.

Notice to a former owner, as to any matter connected with the property, will be binding on one who subsequently acquires it from him. *Per Curiam*: The latter can have no greater rights than the party from whom he acquired his title.

In an action to restrain defendant from selling certain ground, alleged by plaintiff to have been dedicated to public use, a plan of the property published by the former, and a prospectus reciting the conditions on which he proposed to make the dedication, laid before the Council of the city in which the ground is situated, with a view to obtain its co-operation in effecting the dedication, will be admissible in evidence. Any objection to the evidence as irrelevant and not affecting the plaintiff, goes to its effect, not to its admissibility.

APPEAL from the District Court of the First District, *Buchanan, J.*

L. Peirce, for the appellant.

Roselius, for the defendant.

MORPHY, J. The petitioner alleges that she is the owner of a parcel of land in the parish of Jefferson, formed of lots marked 1, 2, 3, 4 and 5, on a plan made by Bourgerot, in 1830; that this property is derived, by sundry meane conveyances, from the defendant, who sold the same as fronting on "a contemplated continuation of Camp street, to be called Liberal street," and on the above mentioned plan, marked or caused to be marked the aforesaid street. She avers that, by reason of these acts and the plan, Guillotte, the defendant, dedicated the said projected street to the public, and more particularly to her and the other purchasers of the property, to serve as a public highway; that by the sale of said lots as fronting on said projected street, according to said plan, the soil of which was then Guillotte's property, the right of way over the projected street was irrevocably vested in the public, and the purchasers of property fronting thereon, and Guillotte had no right, from that time, to close up, nor in any manner obstruct said street. She avers that one of the principal inducements to the purchase of this property was, it's fronting on said projected street; that the large price paid for the same was on the warranty contained in the acts of

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sale and the plan, of the existence of said street. She further avers that, notwithstanding such sale and dedication, the said Guillotte has since made a plan, and has laid out and marked thereon lots which cover and occupy the said projected street, and has sold or endeavored to sell said lots, and has, in various other ways, obstructed said street ; and that by said illegal and tortious proceedings she has suffered twenty thousand dollars damage. She prays that Guillotte be perpetually enjoined from selling the soil reserved and dedicated for said projected street, and from enclosing, or in any manner obstructing the same ; and that the use of said street, as a public highway, be decreed to be forever vested in the public ; &c. The defendant admits that he originally sold the property at present belonging to the plaintiff, but he expressly denies that he ever dedicated the space or street referred to in her petition. He avers that, at the instance of the City Council of New Orleans, he consented to open said street, for and in consideration of five thousand dollars ; that for the purpose of raising said sum, a subscription was opened, and the Mayor subscribed \$500 on behalf of the city ; that various other persons subscribed for small sums, but the amount required was never subscribed for ; that the projected opening of said street referred to the subscription aforesaid, and was only to be carried into execution if said sum of \$5,000 should be paid to him ; that this condition was well known to the person or persons under whom the plaintiff holds the lots in question, and that, under these circumstances, he is not bound to open the said street. The judgment of the inferior court was in favor of the defendant, and the plaintiff has appealed.

The evidence shows that, in 1825, P. A. Guillotte laid before the City Council of New Orleans a plan, on which a street was figured across his property in the Nuns' suburb, as the continuation of Camp street, and to be called "*Rue des Liberaux*." To this plan was appended a prospectus, stating, in substance, that having been spoken to several times as to the necessity of opening this street, P. A. Guillotte proposed to the Council to contribute to such opening, and agreed to deliver up the space necessary for the intended street, provided a sum of \$5,000 was raised by subscription to indemnify him for the loss of his dwel-

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ling house, and out houses, which stood on the spot where the road was to pass, for the fences he would have to construct on both sides of the new street, &c. The Mayor, under a resolution of the Council, subscribed \$500 for the city, and was followed by a number of individuals who subscribed only small and insufficient sums of money. In January, 1830, the defendant caused a plan to be made by Bourgerot, of a portion of his property, which was divided into nine lots, numbered from one to nine, and which was marked on the plan as encompassed between St. Mary's Road, Tainturier street, St. Andrews Road, and "*La rue des Libéraux projetée.*" In April following, the defendant had these lots sold at auction, and the deeds of sale which he passed refer to the plan, and mention the property as comprized between the three first above mentioned streets, and "the contemplated continuation of Camp street, to be called Liberal street." This description is repeated in the successive sales of these lots, from 1830 down to that under which the plaintiff, in 1841, acquired the five lots she owns. The testimony shows that the subscription list was kept open for a number of years; was presented to all the neighbors in the vicinity of the projected street; and that the defendant, and some of his friends exerted themselves, but without success, to fill up the subscription. The project having thus failed, no part of the sums subscribed for was ever paid, and the street was consequently never opened, or delivered to the public. In 1836, the defendant opened a street or a continuation to Camp street, across his property in another direction, and made out a plan of it, according to which he sold some lots.

Admitting that the petitioner, between whom and the defendant there exists no privity of contract, can maintain any action against the latter on account of his promises and undertakings towards the original purchasers at his sale in 1830, where her act of sale contains no subrogation of her vendor's rights against previous vendors, the facts of the case do not, in our opinion, show any dedication of the soil in question to serve as a public street or highway. The expressions used in the plan, and in the deeds of sale, show no positive undertaking on the part of the defendant; they were not calculated to mislead, nor

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did they probably mislead any one, as they referred to a project which might, or might not be realized, and the circumstances of which had been brought before the City Council, and were, no doubt, a matter of general notoriety in the neighborhood. The space which was to be converted into a street was occupied by the defendant's dwelling-house, and was never opened to, nor in any way used by the public. Although no particular form is required for the dedication of land to public use, the positive assent of the owner, and the fact of the land being used for the public purposes intended by the appropriation, must, at least, be shown. 6 Peter's, 431. 9 La. 152. 18 La. 122, 291, 537. When, in 1841, the petitioner bought this property, the reference in her sale to the plan made in 1830, was sufficient to put her upon the enquiry, why the street, which was contemplated more than ten years before, had not yet been opened. She could easily have ascertained that the project of opening this street had long since been abandoned. On examining the subscription list appended to the plan and prospectus laid before the Council in 1825, we find, among the subscribers to this project or proposition of Guillotte, the name of James Armor, one of the vendors under whom the plaintiff holds lot No. 1, which, of her five lots, alone has a front or boundary on the projected street exhibited by the plan. With the knowledge which he had of the conditions under which alone the projected opening of the street was to take place, Armor could not surely have succeeded to the present suit; and the plaintiff, who claims under him, cannot have greater rights than him. If her immediate vendor failed to acquaint her with the circumstances connected with the projected opening of this street, and she has, in consequence thereof, paid too high a price, or has suffered damage, her recourse, if any she has, must be against him, and not against the defendant.

A bill of exceptions was taken to the admission in evidence of the plan and prospectus laid before the City Council in 1825, which were objected to as irrelevant, and as not affecting the plaintiff. The judge properly considered the objection as going to the effect, not to the admissibility of the evidence.

Judgment affirmed.

Preston v. Slocomb and others.

JOHN PRESTON v. CORA ANN SLOCOMB and others.

Plaintiff intervened in a suit in which defendants had attached certain property as belonging to their debtors, claiming it as his, together with "any loss he might sustain by reason of said seizure." There was no other allegation of any injury or damage caused by the seizure, nor was evidence offered to prove any. The property was adjudged to the intervenor, but no damages were allowed, nor was any claim for them urged, nor was the cause asked to be remanded to assess them. In a subsequent action by the intervenor for damages sustained by the attachment, and exception *rei judicatæ*: *Held*, that the exception should be overruled, the actions not being the same, nor founded on the same cause of action. C. C. 2245.

THE plaintiff appealed from a judgment of the District Court of the First District, *Buchanan, J.*, sustaining an exception of *res judicata*, and dismissing an action instituted by him against the defendants for damages, in consequence of an illegal attachment of his property, in an action against certain debtors of the latter, in which the plaintiff had intervened and recovered the property. The first mentioned suit was tried before the Commercial Court of New Orleans.

Vason, for the appellant. The exception should have been overruled below. The Commercial Court had no jurisdiction of the question of damages. See act of the 14th March, 1839, sect. 3, establishing that court. Moreover, the intervenor could not have recovered damages in the original suit. He could only claim them in a subsequent action.

Eggleston, for the defendants. The exception was properly sustained. Civil Code, art. 2265. *Plique et al. v. Perret et al.* 19 La. 327. Code Pract., art. 394. The Commercial Court had jurisdiction. Whenever a question of title to real estate, or of damages, arises incidentally, the judge of the court having jurisdiction of the principal matter, may decide it. Code of Pract., art. 392.

GARLAND, J. This is an action for damages, which the plaintiff alleges were caused by the defendants attaching his property, in a suit brought by them against the Real Estate Bank of Arkansas, decided in this court, in April, 1842. 2 Robinson, 92. The plaintiff intervened in that suit, and claimed the cotton

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attached as his property, together with "any loss he may sustain by reason of said seizure."

On the appeal of the plaintiff, then intervenor, to this court, the cotton was adjudged to be his property, but the claim for damages was not pressed, nor was it asked that the case should be remanded to have them assessed, none having been allowed in the judgment of the Commercial Court, which was against the then intervenor. The petition now sets forth special grounds for damages, to wit, the necessity of employing counsel, the loss occasioned by laying out of the use of his property and money for nearly a year, and other causes. The defendants, in their answer, present the peremptory exception of the thing adjudged, and other grounds of defence, which it is not necessary to state, as the exception was sustained, and the suit dismissed; from which judgment the plaintiff has appealed.

The sole question is, whether the court erred in sustaining the exception; and to ascertain that, it is necessary to see what was the matter in contest between the plaintiff and defendants, in the suit of the latter against the bank. We have carefully examined the petition of intervention in that case, and do not find any allegation in it of any injury or damage caused by the seizure of the cotton; nor was any evidence offered to prove any. There is nothing to prove a demand for damages, further than the prayer, that Slocomb, Richards & Co. may pay "any loss he may sustain by reason of said seizure." No inquiry was gone into in relation to such loss, nor was the court asked to go into it; if it had been so required, it might have been well questioned whether any testimony could have been received in relation to damages, when there was no allegation of any having been sustained. Article 2245 of the Civil Code says: "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other, in the same quality." Upon a comparison of the allegations in the petition of intervention, and those now before us we cannot say that they are the same, nor founded on the same

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cause. We, therefore, cannot concur with the court below, in sustaining the exception.

It is ordered and decreed, that the judgment be annulled and reversed, and the cause remanded to the District Court, to be further tried and proceeded in according to law; the defendants paying the costs of this appeal.

JAMES OGILVIE v. NORBERT RILLIEUX.

A purchaser of property sold under a *fi. fa.* having applied for a monition under the act of 10 March, 1834, the judgment creditor opposed the homologation of the sale, on the ground that the property had been incorrectly described both in the execution and the advertisement. The property was described as bounded on one side by *Clement* street, instead of *Chestnut* street, the real boundary. There was no such street as *Clement* street; and the description was, in other respects, accurate. *Held*, that the description being in other respects sufficiently accurate to indicate the extent and location of the property, the error, which was clearly a mistake made by the sheriff in copying the description, was immaterial, and could neither invalidate the sheriff's sale, nor support an opposition to its homologation under a monition taken out in pursuance of the act of 1834.

APPEAL from the District Court of the First District, *Buchanan*, J.

Elwyn, for the appellant.

Durant, contra.

SIMON, J. The plaintiff having obtained judgment against the defendant for the sum of \$4790, with the vendor's mortgage and privilege on certain property described in two acts of sale annexed to his petition, a writ of execution was issued against the defendant, which was levied on the property mortgaged, and after having been offered for sale for cash by the sheriff, the property not having brought two-thirds of its appraisement, it was sold and adjudicated to one Kaspar Auch, for the sum of two hundred dollars, which, though payable at twelve months credit, was paid in cash by the purchaser.

A short time after the sale, the purchaser applied to the court *a quâ* for a monition, in conformity with the law of the 10th of March, 1834, which order was granted; whereupon the adver-

tisements required by law were published in a newspaper of the parish where the sale was made, giving a description of the property, in conformity with the writ by virtue of which the same had been sold.

James Ogilvie, the judgment creditor, made opposition to the homologation of the sale, on the ground that the property was not correctly described, either in the writ of *feri facias*, or in the advertisements of sale made by the sheriff, in this: that the squares of ground have *Chestnut* street for a boundary, instead of *Clement* street, which was described as their boundary both in the writ and in the advertisement posted up by the sheriff; that said property is worth much more than \$200; was of much greater value at the time of sale; and that, had it been properly described, it would have been sold for a much higher price.

The sale was homologated below, notwithstanding the opposition; and, from the judgment rendered thereon, Ogilvie has appealed.

It does not appear to us that the judge *a quo* erred. It is true, on referring to the second deed of sale, one of the squares of ground therein sold, is described as "*being No. 5, containing eighteen lots, numbered from one to eighteen inclusive; measuring 380 feet front on the public road, 186 front on Broadway, 240 front on Front street, and 416 feet front on Chestnut street, English measure,*" &c.; and that on referring to the writ and to the advertisement of the sale, the word "*Chestnut*" has been replaced by the word "*Clement*." This is clearly a mistake made by the sheriff in copying the description, which in all other respects is exactly in the same words as that of the sale, and which, independent of this change of name as to one of the surrounding streets, is yet sufficiently accurate and explicit to indicate the extent and location of the property seized. It has not been shown that there existed any street called "*Clement*," by which the property, with its further description, could be bounded; and it seems to us that the mistake is so immaterial, accompanied with the correct description of the three other boundaries, that the identity of the property could not suffer from it. *Id certum est, quod certum reddi potest*; and it is clear that a mere reference to the

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sale would have been sufficient to ascertain its correctness. See case of *The City Bank v. Denham*, decided in March, 1844.

Furthermore, the 3d section of the law of 1834, (Bull. & Curry's Digest, p. 585,) only requires that the monition shall state the same description of the property purchased as that given in the *judicial conveyance* to the buyer. This was done in this case; and we are of opinion that, as the alleged mistake in the name of one of the streets by which a part of the property sold was bounded, would not be sufficient to invalidate the sheriff's sale, the description being correct in all other material respects, this cannot be relied on in support of an opposition to its homologation under a writ of monition. The opponent was the creditor at whose suit the property was sold; the sale was made for his benefit, by an officer who acted as his agent; and we are not prepared to say that, under such circumstances, he has any right to contend that a mere mistake made by the sheriff in his advertisement of such sale, made at his request and shown to be immaterial, should authorise the opponent to consider it as a nullity. Be this as it may, it is not pretended that the description of the other property which was sold under the same title with that in dispute, on the same day and under the same adjudication, was incorrectly given, and it seems to us clear that the sale thereof cannot be partly invalidated.

Judgment affirmed.

MARY H. ROSS and others v. JOHN GARLICK.

Where a clause in a contract of sale, if interpreted literally, would be contradictory of other parts of the act and of doubtful meaning, the common intention of the parties, rather than a literal construction of the clause, should determine the interpretation. C. C. 1945.

Where the language of an agreement is susceptible of two meanings, it must be interpreted in the sense most congruous to the whole contract. C. C. 1947.

A party cannot allege his own turpitude.

APPEAL from the District Court of Iberville, *Nicholls, J.*

GARLAND, J. On the 5th of April, 1841, the plaintiffs sold to the defendant, by authentic act, a tract of land of about five ar-

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pents front by forty in depth, more or less, situated on the bayou Goula, the consideration being the sum of \$4000 cash, as stated in the act. On the same day a written instrument was signed by all the parties, in the presence of the notary and witnesses, in which it is said, "that the sale or bargain was first made for the sum of \$4000, one-half payable in one year, and one-half in two years from the day of sale; but in the expectation that the first note could be discounted in one of the Plaquemine banks, the Union Bank, or the Exchange Bank, the said sale is made for cash at the price of \$4000, although no part of it has been paid, to enable the purchaser John Garlick, to obtain a loan on it, in the Union Bank; and in case he obtains the loan, and pays the money down, within from four to six weeks, the sum he is to pay is \$3500. In case he should fail in this, the record of this writing shall have the full effect of a mortgage, with privilege of the vendor for the payment of the price of \$4000, as above mentioned, in one and two years from this day; that is to say, the said land shall remain specially mortgaged for the payment of the said price as aforesaid. It is further agreed that in case the whole of the money is not paid within four to six weeks, or the half of the price discounted at bank interest of seven per cent, the said sale is to be null and void."

Garlick made an application to the branch of the Union Bank at Plaquemine to lend him \$4000, to be secured by a mortgage on the land, and a number of slaves named in his application. The bank agreed to do so, provided the titles to the property were satisfactory. They were referred to the attorney of the bank, who reported that the titles were good: "But that no patent had as yet issued for the land. That if the bank insisted on that, the titles would not be perfect; otherwise, they would be. That a receipt is as much evidence of title as a patent under the old law; it might not be so under the law of June 22d, 1838, and revived May 1st, 1840." In consequence of this report, the bank declined to lend the money.

On the 17th of July, 1841, William H. Carr, the husband of Diana, one of the plaintiffs, addressed a letter to Garlick, stating that as the money had not been paid for the land within six weeks, he considered the sale null and void; and that Garlick

must quit the premises, or pay rent at the rate of ten per cent on the amount of the price. At what time the defendant received this letter is not shown; but he did not quit the land in consequence of it, so far as the record informs us. At a subsequent period, but when precisely is not proved, the defendant gave a written notice to the plaintiffs that he considered the sale null and void, as he could not obtain the loan from the bank in consequence of the defective title of the plaintiffs; that the title was in another person; and that no payment had been made; and finally he claimed damages of them for failing to comply with their contract, and for the value of improvements put on the premises.

Sometime after the bank had declined to make the loan, on an application to the General Land Office for a patent for the land in the name of the plaintiffs, it was refused, on the ground that one had already been issued in the name of Andrew Hodge, junr., by virtue of an assignment to him by the plaintiffs. They denied the legality of any such assignment, and, together with the defendant, brought a suit against Hodge, to set it aside and quiet the title; in which action they were successful, and Hodge was decreed to have no title to the premises. About seven months after this judgment was rendered, the defendant not paying any part of the price, the plaintiffs had the second act or counter-letter recorded; and some months subsequently commenced this suit to recover \$4000, with legal interest from the times of payment and the execution of the mortgage and privilege.

The defendant, in his answer, admits the sale of the land as alleged and proved, and that he was to apply to the bank for a loan to pay for it, which he did, and was refused; wherefore he says that, according to the terms of the contract, the same was null and void. He avers that the plaintiffs illegally sold him a tract of land, to which they had no title. That they had previously sold it to Hodge, who held the patent, and refused to give it up; and that the suit against Hodge, as between him and the plaintiffs, was fraudulent and collusive, and intended to put them in a position to sue for the price of the land.

The court below gave a judgment for the defendant, and the plaintiffs have appealed.

From all the evidence in the record, it is certain that, as between the plaintiffs and the defendant, it was, in the first instance, the intention that the former should sell, and the latter purchase the land upon one and two years credit; and that none of them had any idea of applying to the Union Bank for a loan until they appeared before the parish judge to pass the sale, and he suggested the probability of a loan being obtained, whereby the plaintiffs would receive \$3500 in cash, instead of \$4000 in instalments of one and two years, and the defendant obtain a longer time for the payment of the latter sum, than that agreed upon by the parties in the first instance; and the question arises whether, after the probability of a loan was suggested, the parties intended to make the obtaining of it a condition upon which the sale was to take effect, and to change their previous understanding and agreement? When we look at the parol testimony on behalf of the defendant, and all the stipulations of the counter-letter or second contract, except the last clause, there cannot be a doubt as to the intention of the parties. An absolute sale was intended, and actually made for cash. By the counter-letter that sale was, in a certain event, to be changed into one upon terms of credit, and the acknowledgment of the cash having been paid annulled, and a mortgage stipulated to secure the price.

We do not any where find an absolute stipulation, on the part of the plaintiffs, to guaranty a loan being made by the bank, nor is it contended that such a warranty was intended; but the counsel for the defendant insists, and the court below so held, that they were bound to give him a good title so that he might obtain the loan. In the manner in which this position is stated, there may be some doubt of its correctness; but admitting it to be true, it appears to us that it was in effect complied with. The attorney of the bank stated that "the titles of the applicant were good." He says that no patent has yet been issued, and that if the bank insist on that, the title to the land would not be complete; but that the receipt and certificate of the Register and

Receiver were as much evidence of title under the old law as a patent. The plaintiffs had purchased the land under an old pre-emption law. The receipt for the money is dated in January, 1824. It was, therefore, not a want of title to the property, according to the opinion of the attorney for the bank, that prevented the loan from being made, but something else. The defendant's counsel now says, that it was because some of the plaintiffs had previously sold the land to Hodge; but the evidence does not sustain him, as it is clearly proved, that none of the parties thought of this assignment at the time; and the attorney for the bank declares that he knew nothing of it, and consequently did not take it into consideration, when he passed on the title to the property. Nothing was said about the patent at the time of making the contract; and as it was not given to the defendant with the Receiver's receipt and Register's certificate, it is fair to presume that he knew that the plaintiffs did not have it, and were, therefore, not bound to furnish it. The warranty of the plaintiffs was to defend the title they gave to the defendant, and not an agreement to give one satisfactory to the directors of the bank. So far as the record informs us, no one has ever disturbed the defendant in his possession, nor attacked his title, either directly or indirectly.

It remains for us to decide, what is the meaning and effect of the stipulations, "that in case the whole of the money is not paid within from four to six weeks, or the half of the price discounted at bank interest of seven per cent, the said sale is to be null and void," and in whose favor they are made, and who can invoke them. These words, if literally interpreted, appear to us contradictory of what precedes them in the act, and of doubtful meaning; we must, therefore, endeavor to ascertain what was the common intention of the parties, rather than to adhere to the literal sense of the terms. Civil Code, art. 1945. We do not believe it was the intention of the parties by the first clause in the stipulation, to declare that the defendant could, by neglecting or refusing for four or six weeks to pay the price, thereby annul the whole contract, because it would be at war with other provisions and agreements, and enable him to defeat the common will of the parties. It was clearly the object and

intention of the plaintiffs to sell the land, and of the defendant to purchase; and not their purpose merely to give the latter an option to buy, or not, as he might choose, at the end of four or six weeks, by paying the whole of the money, or refusing to do so; and, as we have before said, it was not the intention of the plaintiffs to guaranty a loan from the bank, therefore it was not their intention, in the event of its being refused, that the contract should be entirely null. We think the true meaning of the stipulations is, that, in the event of the price not being paid in the time specified, or the bank not making the loan, the sale should be null and void, so far as it might be necessary to give effect to the other agreements entered into by the parties, to secure the payment of the price in one and two years, as at first agreed on. This interpretation gives effect to all the clauses of the contract, and puts the parties in the situation in which there is no doubt they intended to stand, previous to the suggestion made by the parish judge, of the probability of a loan being obtained. Civil Code, arts. 1946, 1947, 1948. The agreement is no doubt susceptible of two meanings; and we must, therefore, take it in the sense most congruous to the whole contract.

We are of opinion, that there is no foundation for the defence set up by the defendant, that the plaintiffs had divested themselves of title to the land by the sale to Hodge, and that the suit, by which said sale was declared null, and they quieted in their title and possession, was collusive and fraudulent. There is nothing in the circumstances to justify such an allegation; and if there were any thing, the defendant is as much implicated as any one of the plaintiffs, as he was a party with them to that suit, and cannot set up his own turpitude as a defence. The judgment in that case divests Hodge of all title or claim,—in fact he never set up any; quiets the title and possession in the defendant; and entitles him to the possession of the patent. It is general and final, and the time for taking an appeal has elapsed. The defendant, therefore, complains with an ill grace of a judgment which makes his title good, so far as the plaintiffs, the United States, and Hodge are concerned.

As to the apprehensions expressed, of being disturbed by the

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judicial mortgages existing against Andrew Hodge, jr., we see no ground for them. If the land was not the property of Hodge, the recorded judgments cannot effect it in the hands of the defendant. When he and the plaintiffs succeeded in their petitory action, they put an extinguisher on the mortgages.

Upon a full consideration of the whole case, we are of opinion that the judgment is erroneous, and must be reversed.

It is ordered and decreed, that the judgment of the District Court be annulled and reversed, and that the plaintiffs recover of the defendant, John Garlick, the sum of four thousand dollars, with interest at the rate of five per cent per annum on one half of said sum, from the 5th day of the month of April, 1842 until paid, and interest, at the same rate, on the other half of the same, from the 5th day of April, 1843, until paid; and it is further decreed, that the mortgage, and vendor's privilege in favor of the plaintiffs be recognized and rendered executory, and that process issue to sell the premises to satisfy the debt, interest, and costs; the defendant paying the costs in both courts.

Labauve, for the appellants.

Edwards, for the defendant.

ROBERT BRENT v. CHARLES A. SLACK, Testamentary Executor of
Eliphalet Slack, deceased.

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Where the demand exceeds five hundred dollars, the testimony of a single witness, not supported by corroborating circumstances, is insufficient.

APPEAL from the Court of Probates of Iberville, *Dutton*, J.

Labauve, for the appellant.

Edwards, for the defendant.

GARLAND, J. The plaintiff sues for a sum of \$1,895 50, with interest, alleged to have been received for him by the defendant's testator, in the year 1836, for which it is said he never accounted, although more than seven years had elapsed when the claim was set up. A judgment by default was taken, which was set aside by the defendant's filing an answer, containing a general denial, and a plea of prescription. On the trial,

the suit was dismissed, the judge giving as a reason, the absence of any proof of the claim ever having been presented to the executor for his approval or rejection, previous to a suit being brought. Code of Practice, art. 984. Both parties moved for a new trial, which was refused, and the plaintiff has appealed.

The reason given by the judge of the Probate Court for his judgment, has principally occupied the attention of the counsel in this court, and in their zeal, on the one side, to prove that it is not a good reason, and that such an objection cannot be interposed in the present state of the pleadings, and, on the other, that it is sufficient, and can be urged, as the case is presented, both parties have overlooked the testimony. An examination of it proves the correctness of the judgment, although the court does not refer to it. The allegation is, that the testator of defendant, who lived in the same parish with the plaintiff, in the year 1836, received of the factors of the latter in New Orleans, \$1,895 50, to be delivered to him, which he never did deliver, or account for in any manner. About seven years elapsed from the date of the alleged receipt of the money, and the time when the succession was opened by the defendant's qualifying as executor, and no demand of the money is proved during all that time, nor that any effort was made to recover it. The delivery of the money to E. Slack, deceased, is only proved by one witness, which is clearly insufficient, the demand exceeding five hundred dollars. That witness is one of the factors said to have given the money to the testator. His testimony is general and indefinite, and not sustained by any corroborating circumstances. The lapse of time, and the character of the demand, make us suspicious of the claim, which needs explanation.

Judgment affirmed.

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PIERRE PAUL BABIN v. JOAN NOLAN.

A judge before whom a cause is being tried, is a competent witness for either party. The act of the 25 March, 1828, sec. 6, provides in what manner he shall be sworn, and how his testimony shall be reduced to writing, if required by either party.

Art. 2377 of the Civil Code, which provides that when the hereditary property of either of the spouses has been increased or improved during the marriage, the other shall be entitled to one half of the value of such increase or amelioration if proved to have been the result of the common labor or expense, does not contemplate that to ascertain the value of such increase or improvement, every item of improvement shall be estimated separately, and the aggregate amount added to the estimation of the land. This would often be unjust, as the increased value of the property would, in many cases, be far from equal to the original cost of such improvements.

APPEAL from the Court of Probates of West Baton Rouge,
Favrot, J.

SIMON, J. This is the sequel of a case which we had twice occasion to remand to the inferior court for further proceedings, in the adjustment of the rights of the parties to the value of certain improvements, made during the existence of the community, on the plantation owned by the defendant. See *Babin v. Nolan*, 4 Rob. 278, and 7 Robinson. According to the last decision of this court, the only matter in controversy upon which the action of the inferior tribunal was required, was to ascertain the exact increase in value of the defendant's plantation, for one half of which the plaintiff, as heir of his deceased sister, should be compensated in the settlement of the community, according to the legal principles recognized by this court.

Accordingly, after the return of our mandate to the lower court for execution, it appears by the record that on the 22d of April, 1844, the parties came before the court *a quâ*, and the following entry was made upon the minutes of said court, to wit: "By agreement of parties, the trial of the matters relative to the improvements, are fixed for trial for Monday next, the 29th instant."

On the day appointed the trial commenced, and each party produced his witnesses; and, after a full investigation of the matters in controversy, judgment was rendered by the court *a*

quâ, condemning the defendant to pay to the plaintiff the sum of fifteen thousand dollars, being the one half of the enhanced value given to the said defendant's separate property, from the improvements placed thereon during the existence of the community; and from this judgment the defendant has appealed.

The record which has been brought up by the appellant, appears to contain, under the certificates of the clerk and of the judge, all the evidence adduced by the parties on the trial of the case below, and all the proceedings had during said trial; but before enquiring into the correctness of the judgment appealed from, it becomes necessary for us to dispose of an application made by the appellant's counsel, to be permitted to bring under our consideration, a certain bill of exceptions, alleged to have been taken to the opinion of the inferior judge upon another subject, and which, not being in the record, said counsel requested us, on the filing of their affidavit, to order the production of by a writ of *certiorari*.

Before this cause was fixed for trial, a motion was made by the appellant's counsel, supported by their affidavit, for an order to be directed to the judge *a quo* and to the clerk of his court, instructing them to make a complete transcript of all the proceedings, as well as of all the documents used and filed in this suit on the 22d of April, 1844, and to send them up to this court, consisting in an account marked A, a written motion marked B, an affidavit marked C, and a bill of exceptions; all relative to a certain motion made by the defendant on said day, for leave to examine certain witnesses to prove and establish the account A and vouchers, and to prove that the appellant, Nolan, paid the community debts stated and established in said account, which existed against the community between him and his deceased wife, and also for leave to take commissions to procure the testimony of other witnesses to prove said account and vouchers, &c.; which motion was overruled by the judge of probates, to whose opinion a bill of exceptions was taken, &c. A writ of *certiorari* was issued accordingly, to which the judge and his clerk filed separate answers.

The judge *a quo* states, in substance, that the documents required to be brought up have never been filed in the suit, be-

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cause they had been refused by the lower court, whose judgment was affirmed by the appellate tribunal; that said judgment was considered as *res judicata*, because the account and vouchers had been twice produced and rejected—the first time on the trial of the matter of the crops, and subsequently on the trial of the matter of the improvements, which was the only question then remaining open under the decision of this court. He further states, that said account was again rejected, because the court was aware that the same was false, as the defendant at the time of the inventory had declared that he owed nothing, and had given a memorandum of the amount due him, &c.

The clerk answers that when he was called upon by the defendant to make out the transcript, he was required by *both* counsel to leave out all documents and proceedings which had not a strict bearing on the matter at issue, to wit, the value of the improvements. That on perusing the minutes and papers in the suit, he ascertained that only two documents were to be left out, to wit; 1st, a motion made by defendant to examine witnesses to prove payment of community debts, which was overruled by the court; and 2d, an order of the court relative to the defendant's objections to the sale of community lands, &c., which were also overruled. He further states, that he has been unable to find the documents mentioned in the *certiorari*, and that they have never been filed. He also recollects that the account and vouchers spoken of were presented several times by the defendant's counsel, to be filed, but were as often rejected by the court, which refused to let them be filed; and he concludes by saying, that the papers called for have never been in his possession, and that it is impossible for him to give any transcript thereof.

After the filing of these answers, the appellant's counsel filed a counter-affidavit, in which they contradict the statements made by the judge and clerk; but the appellee's counsel, having consented to take the copies produced by their adversary as if they were true copies from the originals really in existence, the question now presented by the arguments is, whether the motion made by the appellant's counsel on the 29th of April, 1844, was properly overruled?

It is proper, however, that we should remark, that, in due respect to the judges of inferior tribunals, we were not ready to permit or countenance any investigation of the reasons for which the documents called for were not produced, any farther than they were shown by the answers of the judge *a quo* and of his clerk. They should be conclusive, in our opinion; and we should have disregarded the appellant's application after said answers were read, showing that said documents were never filed, had not the appellee's counsel consented to consider them as a part of the record, and had we not been impressed with the idea that the appellant, who appears determined to protract this litigation as long as he can, might perhaps subsequently make it a ground for further delaying the final adjustment of this cause.

But supposing the bill of exceptions to be now regularly before us, we think the appellant's motion was properly overruled. This is clearly an attempt to introduce now into this cause, a matter which should have been brought before the inferior court on the trial of the suit on its merits under the issues presented by the pleadings, and particularly on the trial of the matters relative to the liquidation of the proceeds of the crops sold and disposed of by the appellant, the investigation of which, as also of the defendant's claims for the payment of community debts, had been postponed by an interlocutory judgment rendered on the first trial of the case, to a further and subsequent period. It appears from the old records, and from the defendant's affidavit, made below in support of his motion, that these are the same account and vouchers which were once offered to be filed, in support of an account of administration which the defendant had pretended to offer to the court *a quâ*, when he made an application for a rule on his adversary to show cause, *within three days*, why said account should not be homologated. This was refused by the court, which, as we held in our last decision, very properly decided that there was no account to be homologated, and that it was the duty of the defendant to furnish evidence of the expenditures by him claimed, as they could not be allowed without proof. Whereupon, the defendant and his counsel left the court room, and refused to attend any more to the trial,

which went on in their absence ; and the liquidation of the proceeds of the crops was finally adjudicated upon, leaving a balance against the defendant. He took an appeal to this court, which resulted in the affirmance of the judgment complained of ; and if he is to sustain any loss from declining to produce his evidence in due time, and from abandoning his cause on the day of the trial, he cannot blame any one but himself.

Furthermore, on referring to the pleadings, we find that the appellant pleads in his answer, in compensation of the proceeds of the crops which he was called on to account for, the community debts he alleges to have paid ; and that he claims also a certain amount which he says is due to him, as the proceeds of obligations, mortgages, notes and other accounts, to which he is entitled ; and he prays to be allowed to retain possession of the community property until his advances are fully paid. These last matters were investigated in our first decision, when the judgment appealed from was affirmed, in all respects, except as to those which were reserved for a subsequent investigation, and which became afterwards the subject of the second appeal. 4 Rob. 278. On the second appeal, the judgment of the lower court was again affirmed, except with regard to the matter of the improvements ; and we did not then entertain the idea that the appellant, who had so improperly withdrawn from the trial of the cause, on the day fixed with his consent, because the judge *a quo* had refused to receive and homologate his account without proof, should any longer be permitted to bring in question his said account and vouchers, which were, under the pleadings, closely connected with the matter of the crops definitely settled ; or any other subject matter but that, for the adjustment of which the case was remanded. A careful re-examination of the old records has satisfied us that all the money matters existing in controversy between the parties on the previous trials below, and before this court, have been finally settled and adjudicated upon by the judgments subsequently affirmed ; that the various sums shown to be due to the defendant by the community, have been justly liquidated ; that those judgments have now the force of *res judicata* between the parties, upon all the subjects therein determined ; and that they must have the same

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effect on the account and vouchers which the appellant, having failed to produce and prove in due time, has sought in vain to introduce and investigate in the lower court, beyond the object which we had in view in remanding this cause for further proceedings. See also the case of *The State v. The Judge of the Court of Probates of West Baton Rouge*, decided in June, 1844. It is now too late ; and we conclude, therefore, that the appellant is now precluded from setting up the pretensions upon which he based his motion which was overruled by the inferior court ; and that the only matter which we have to consider on this appeal, is the one which we shall now proceed to examine.

In its present stage, the case on its merits presents a mere question of fact, which appears to have been thoroughly investigated below ; but before proceeding to weigh the evidence upon which the judgment appealed from was rendered, it behoves us to inquire into several bills of exceptions which are found in the record.

The first is with regard to certain questions put by the defendant's counsel to the first of the plaintiff's witnesses on his cross-examination, with the view of enquiring into the estimate, or particular value of each of the buildings, for the purpose of ascertaining upon what basis said witness made his estimate of the whole plantation, including the improvements, and whether the cost of the clearing, fencing, and ditching, did not form a part of his estimate ? The witness had already stated that it was worth from \$25 to \$30 per *arpent*, for clearing, fencing, and ditching the front land ; that the whole front was cleared, ditched and fenced ; and that it was worth the sum of \$15 per *arpent*, to clear the back land ; and he had gone into a statement of the particulars of the buildings erected on the property, since the marriage up to its dissolution. It seems, from the bill of exceptions, that the plaintiff declared that he had no objection to the witness being asked any question, to show *upon what basis the property was by him estimated* ; but that his objection was, that the defendant should not take this opportunity of enquiring into the costs of ditching, clearing, and fencing, and of each particular building or improvement ; which objection was sustain-

ed by the judge *a quo*, as applicable also to all the witnesses subsequently examined.

We think the objection was well founded. We have already said, in our first decision, that "we did not understand the law to mean that to ascertain the value of the increase of property, every article of improvement should be estimated *separately*; and that with regard to the increase of value of the land, resulting from its having been cleared and ditched during the marriage, it ought not to be *especially* allowed; because, if any advantage has been derived to the defendant by increasing the value of his land, such increase would necessarily be accounted for and included in the estimation thereof made under the rule by us established." Under this view of the question then presented, we never intended that the parties should be permitted to go into an enquiry as to the separate estimate of each improvement, and of the original cost thereof; these facts are entirely foreign to the issue in controversy; an inquiry into them would only mislead or serve to confuse the testimony, and prevent the exact ascertaining of the increase of the property in the true spirit and meaning of the law; and we are not ready to say that the plaintiff's objection to such an improper enquiry, was incorrectly sustained. It appears, also, from an examination of the testimony, that the subject in dispute has been enquired into to its fullest extent, under the doctrine settled in our previous decisions.

The next bill of exceptions which we deem it necessary to examine, is in relation to the testimony of the judge of the inferior court, which was objected to by defendant's counsel, on the grounds that as said judge was obliged to form his opinion and judgment of the value of the improvements by the facts shown by the evidence, and by the testimony of other witnesses, this would be permitting the judge to prejudge the very question which he had to decide after hearing all the evidence and testimony on both sides; but the plaintiff's counsel having insisted on the presiding judge's answering the questions, his testimony was taken and reduced to writing to serve as evidence in the cause.

By an act of the legislature of the 25th March, 1828, (Bull. &

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Curry's Digest, p. 432, § 6,) it is provided, that in every case pending in any court provided with a clerk, in which the judge of said court may be a material witness, the clerk shall administer the oath to said judge, and shall take down his evidence in writing, which shall be filed *and used as evidence in the cause*. The object of this law was to remedy a great inconvenience, and to point out the manner in which presiding judges should be sworn and their testimony procured, as theretofore the parties were deprived of their evidence, owing to their being no one authorized to administer the oath to them in open court, whilst they presided. That a judge is a competent witness to testify in any cause, is incontrovertible. The law has made no such exception to their competency as witnesses; and although the facts which are within their knowledge, might, from their materiality, turn the scale in favor of one of the parties litigating their rights before them, and be the basis of the judgment to be rendered in favor of such party, we cannot see any valid reason why a suitor should be deprived of such evidence in support of his rights, because, forsooth, the judge whose testimony has been procured, is to pronounce his judgment upon the cause in which such testimony is to be used. The objection was properly overruled.

The third and last bill of exceptions which we shall notice, is to the rejection of that part of the testimony of a witness, going to prove the materials employed in certain separate buildings of the defendant, and used afterwards in the construction of the buildings appraised as belonging to the community. We concur with the judge *a quo* in the opinion, that under the course pointed out by this court in its former decrees, the value of the buildings existing on the place in 1823, are necessarily included in the estimation made of the value of such place with the same buildings in 1841; and that, therefore, the value of the materials subsequently used for the benefit of the community, are also included and accounted for in such estimation. The evidence offered would only serve to charge the community twice with the same thing, and we think it was properly rejected.

We now pass to the merits of the enquiry, and we must ac-

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knowledge that, although it is a mere question of fact, it is not free from difficulties. A certain number of witnesses have been examined on both sides, who have not only differed on the estimate of the property according to its value, with or without the improvements existing thereon at the time of the dissolution of the community, but have also given different and inconsistent reasons to show the basis of their respective estimations. For instance, the first witness introduced by the plaintiff, states that the value of the plantation at the dissolution of the community, in the state in which it was at the time of the marriage, was \$20,000 ; that said plantation was worth, with the improvements at the time of the dissolution of the marriage, \$50,000 ; and that the clearing, fencing and ditching of the defendant's land was worth, for the front tract, between \$25 and \$30 per acre, and \$15 per acre for the double concession, which is the difference between in the state in which it is now, and that in which it was at the time of marriage. On the other hand, from the testimony of the first witness introduced by the defendant, it is attempted to be shown that there is no difference between the value of the plantation in its condition at the time of the marriage, and that in which it was at the time of its dissolution ; and that, although the improvements are by him estimated from \$5000 to \$6000, the difference must be compensated by the quantity of wood that has been destroyed by the clearing. One of them goes even so far as to say that the property, without being cleared and without improvements, would be worth more than it really is at present with all its improvements. This shows the exaggeration into which the witnesses on both sides have fallen ; and the difference of opinions that must necessarily exist between persons who, though equally honest and competent to testify on such matters, adopt for their basis, a state of things which would best suit their interest or their views, if the property to be estimated was their own. The judge *a quo*, however, who had testified in the cause, and who had appraised the property at \$16,400, according to its value in 1841, but in its condition in 1823, and at \$47,000 with all the improvements at the time of the dissolution of the marriage, thought proper to cut the gordian knot by fixing the difference in value at \$30,000,

as being the enhanced value given to the defendant's land, resulting from improvements placed upon it by the community; and in this we think he erred.

It is true, the evidence is so confused and so unsatisfactory, that there is the greatest difficulty, if not an impossibility, of ascertaining precisely the difference in value which the defendant's plantation may have acquired during the existence of the community, from the common labor, expense or industry of the spouses, between the time of the marriage and the period of its dissolution. We were aware that, under the rule by us established, the opinions of most of the witnesses would vary, as they would, perhaps, adopt for their basis, respectively, the relative worth of the property, with regard to their own wants or views, without considering the benefit which the defendant is to derive from it; but, on the other hand, we could not with any sense of justice, or with any propriety, recognize any right in the plaintiff to be compensated for the one half of the value of the increase or ameliorations, by subjecting the defendant to the payment of the one half of the estimation of the separate improvements, or of the cost thereof, for, as we said in our first decision, this would often be unjust, as the relative increase of the property might, in many instances, be very far from being adequate to the cost and expense which the ameliorations originally occasioned. Civil Code, art. 2377. In this emergency, the course which, in our equitable discretion, we have thought necessary to adopt, in order to come to a just and correct conclusion, and to put an end to this long litigation, is to take the testimony of every witness in consideration, notwithstanding their inconsistencies and exaggerations; to refer to and consult the evidence heretofore adduced on the former trials; to sum up the different estimates put on the property; to disregard the cost of clearing and ditching, which, as we have repeatedly said, cannot be *especially* allowed, but must be left to be accounted for in the general estimation of the plantation with its improvements or ameliorations, and to make an average of the different appraisements made by the witnesses on both sides; all which resulted in our ascertaining the value of the increase of the defendant's plantation, to amount to the sum of \$15,513 50, one

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half of which must be by him accounted for to the plaintiff. This conclusion appears to us proportionate to the real value of the property. It agrees substantially with the evidence of all the witnesses who have testified in the cause, on the different trials. It gives, in our opinion, no advantage to either of the parties over the other; and is, it seems to us, a fair criterion by which their rights to the improvements ought to be settled.

It is, therefore, ordered and decreed, that the judgment of the Probate Court be annulled, and reversed; and that the plaintiff recover of the defendant the sum of seven thousand seven hundred and fifty-six dollars and seventy-five cents, being the one half of the enhanced value of the defendant's separate property, resulting from the improvements or ameliorations made thereon during the existence of the community. The costs below to be borne by the community, and those in this court to be paid by the plaintiff and appellee.

Robertson and R. H. Chinn, for the plaintiff.

Brunot, Lobdell and Labauve, for the appellant.

WINNEY HUBBARD v. AIMEE GRIFFIN.

Error or want of consideration must be clearly shown to release a party from an obligation, in which he has, under his signature, acknowledged the debt, and admitted a consideration.

A mortgage for money which the mortgagee contracts to advance at a future time, is valid. C. C. 3259, 3260.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY J. The petitioner sued out an order of seizure and sale on a mortgage by authentic act, executed to her by the defendant, on the 2d of July, 1842, on a lot of ground, with the improvements thereon, situated in Magazine street. This mortgage was given to secure the payment of three notes of \$1,000 each, drawn by the defendant to the order of the petitioner; and the notarial act mentions that the \$3,000 were due for monies loaned and advanced to the defendant for her use and support,

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for the payment of state, parish and municipal taxes, and also for improvements made on the premises mortgaged, &c. The executory proceedings were opposed by the defendant on the allegation, that the notes, and mortgage upon which they are based, were obtained from her by the most gross fraud, misrepresentation, and deception on the part of the plaintiff; that she never was indebted to her in the sum of money mentioned in the mortgage; that she never executed said act, or the notes, with a knowledge that she was creating a debt and a lien on her property; that the same were wholly without consideration, and were obtained by the fraudulent conduct of the plaintiff, in combination with others, to impose on her ignorance, weakness and credulity, and to take advantage of her incapacity to understand and transact her affairs. She further alleges, that the act of mortgage is not, in effect, a public and authentic act, as it purports to be, and that no such proceedings as were commenced by the plaintiff could be had thereon. She concludes by praying that the order of seizure and sale may be set aside, and the notes and mortgage declared null and void, and by propounding to the plaintiff a series of interrogatories, to be answered in open court. Francis Lockwood intervened in this suit, stating that the defendant has no property in the lot and buildings under seizure, but has only the usufruct thereof during her natural life, and that, under the will of the late Jacob Manumishon, from whom the property is derived, the ownership of it is in him; that the sale of the house and lot as the absolute property of the defendant, will cause a great injury to his rights as proprietor thereof, and will expose him to great loss and inconvenience. He further avers, that the said mortgage is null, and can give no rights on the property to the plaintiff, and can operate, if at all, only on the usufructuary interest of the defendant. Upon a hearing of the case, the judge below dismissed the opposition of the defendant, and amended his original order for the seizure and sale of the property, by directing the sheriff to sell it, with the reservation of the right of Francis Lockwood to the same under the will of Jacob Manumishon, in case the said Francis Lockwood shall survive the defendant. From this judgment the plaintiff has appealed.

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No evidence whatever has been offered to prove any fraud or deception on the part of the plaintiff, or to show that the act of mortgage, upon which she has instituted these proceedings, was not executed with the formalities required to make it an authentic act, as it purports to be. It was drawn up by a notary who had made the defendant's will, a short time before. Both parties went to his office. The act was read and explained to the defendant, who said it was correct, and then affixed her mark to it in the presence of the notary and of two witnesses. She is represented by the witnesses as being a woman over sixty years of age, but having as much capacity to understand business as women of her age and color usually have. L. U. Gaiennié, who had been her lawyer, said that he thought her very intelligent for an old black woman. In the answers of the plaintiff to the interrogatories, she stated, that she paid the whole sum for which the mortgage was executed; that \$2500 were paid at different times, between the year 1839 and July 1842; and that she assumed to pay \$500 afterwards, at any time, and in any way that the defendant might require. After stating a variety of payments, or advances made to defendant in person, or to others for her account, such as her doctor's and apothecary's bills, the funeral expenses of her daughter, her account for paving, her taxes, &c., she declared that she could not particularize the other payments made, as, in moving from one house to another, in 1843, she had lost her memorandum book and receipts, with a small box which contained them; that most of the money was lent to the defendant in person, as she asked for it, to pay for taxes, repairs to her house, and for her daily support and expenses; that these advances formed a running account, which was lost with her papers, the items of which varied from \$150 down to 12 1-2 cents, for which she took no receipts, as the defendant could not write, &c. No effort has been made to disprove these answers, and they are corroborated by several witnesses, who mention payments made to them by the plaintiff for the account of the defendant. One of them testifies, that he has frequently seen the plaintiff, who was a next door neighbor to the defendant, lend her money for marketing, buying wood, &c. Nothing authorizes us to say that the

\$3000, which the defendant acknowledged to owe to the plaintiff, have not really been paid to her, when we are left to infer it only from the unsupported charges of fraud and deception to be found in the defendant's opposition. As this court said in *Dugat v. Comeau*, 5 Robinson, p. 475, "a clear case of error, or want of consideration must be shown, to release from his obligation a party, who has, under his signature, acknowledged his indebtedness," &c. In relation to the \$500 paid after July, 1842—a mortgage for money which the mortgagee contracts to advance at a future time, is valid, under our law. Civil Code, arts. 3259, 3260.

The intervenor, Francis Lockwood, relies upon the construction given by this court to the last will of Jacob Manumishon, in the case of *Mishon v. Bein and Husband*, decided in March, 1844; but the opinion there expressed has no bearing whatever upon the present controversy. The whole reasoning of the court in that case was to arrive at the meaning of the testator in the fifth clause of his will, which was drawn up in terms somewhat ambiguous and obscure. After expressing his will in relation to the property on which he resided in Magazine street, the testator proceeded, in this fifth clause, to dispose of all his other effects and property, real and personal, in behalf of Maria Lockwood, and Francis Lockwood her husband. We came to the conclusion that by this clause, taken in connection with the two preceding it, the usufruct of all the property thus disposed of was intended to be given to the defendant Aimée, though such intention was not clearly expressed. We thought that this construction, which gave effect to every word in the will, was the most reasonable, and we are yet of the same opinion; but the third and fourth clauses of this will, which alone relate to the property in Magazine street, since mortgaged by the defendant, are free from any ambiguity. In the first, the testator gives to the defendant Aimée, in express words, the enjoyment, during the term of her natural life, of this property; and in the second, he gives the same property in fee simple to Maria Lockwood, her daughter. Thus it appears that, whatever may be the rights of this intervenor, under the fifth clause of the will, in the other effects or property left by the deceased,

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he has no right nor interest whatever in the premises in question. Maria Lockwood, to whom alone the ownership of the property was given, having died in July, 1841, the defendant, her mother, inherited from her, and thus became the absolute owner of the property.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed; and it is further ordered, that the opposition and the intervention filed in this case be dismissed, with costs; those of the appeal to be borne by the appellees.

Preston, for the appellant.

Grymes, for the defendant and intervenor.

THEOPHILUS R. HYDE and another v. JOSEPH NEWMAN CRADDICK.

10r	387
47	45f
10r	887
111	1002

A party who offers the records of other suits in evidence on the trial in the lower court, is bound to file transcripts of them, at least on being apprized of an appeal, or on being required to do so. Where such transcripts, not having been filed below, could not be included in the record of appeal, the appellant will be entitled to a *certiorari*; and, in case the appellee should not file them after the writ has issued, the case will be remanded for a new trial.

Where a curator *ad hoc*, appointed by the court to represent an absent defendant in a revocatory action, omits to except in the lower court to the action on the ground of the want of proper parties, the failure to make such parties will be noticed in the appellate court as if it had been specially pleaded below. *Per Curiam*: A curator *ad hoc* cannot be permitted to waive any of the legal rights of the party he represents.

Plaintiffs, judgment creditors of the former owner of certain real property, instituted a revocatory action against a vendee in possession, praying that the several acts of sale by which the property had been transmitted from their debtor, through successive purchasers, to the defendant, might be annulled as fraudulent, and the property declared to belong to their debtor, and subject to be seized and sold to satisfy their judgments. *Held*, that the object of the action being to annul all the conveyances as fraudulent, the intermediate vendees of the property, should have been made parties to the suit, which cannot be maintained against the defendant alone; and that to succeed in annulling the sale, plaintiffs must show fraud in the original transaction, as well as in the successive sales, including that to the defendant.

The plaintiffs, judgment creditors of one Joshua J. Hall, instituted this action before the District Court of the First District, praying that certain real property, which had been con-

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veyed from Hall, through several intermediate vendees, to the defendant, might be adjudged to be still the property of their debtor, the conveyances annulled as fraudulent, and the property declared subject to seizure and sale in satisfaction of their judgments. The intermediate vendees between Hall and the defendant, were not made parties. A curator *ad hoc*, appointed by the court to represent Craddick, answered by a general denial of all the allegations tending to show that the property still belonged to Hall, and by a special denial of any fraud or simulation in the several sales. In a supplemental answer, he pleaded prescription. *Buchanan, J.*, rendered a decision in favor of the plaintiffs, annulling the several sales, and declaring the property to be subject to seizure and sale, in satisfaction of plaintiffs' judgment. The defendant appealed.

Lockett and Micou, for the plaintiffs. Craddick, the vendee in possession of the premises, was the only party necessary to the action. The demand having been liquidated by a judgment, it was unnecessary to make Hall a party. Civil Code, arts. 1967, 1971. The intermediate holders were not necessary parties. They had parted with all right, title and interest in the property. The title was vested in the defendant alone, and, under a judgment against him the property could be seized and sold, which was the object of the plaintiffs' demand. The action is analogous to the petitory and hypothecary actions. A plaintiff claiming the property itself, or to exercise his mortgage rights upon it, cites the party whom he finds in possession as owner. If there are intermediate holders, he has nothing to do with them, though the defendant may call them in warranty. So in this suit, the defendant might have called the intermediate parties in warranty. His neglect to do so, has not destroyed his right of action; and if he has any claims upon them, he may still sue them and recover. The plaintiffs had nothing to demand of them, or against them, and therefore did not cite them as defendants.

But this exception of the non-joinder of parties, comes entirely too late. The petition set out the whole line of conveyances, and alleged it to be fictitious and simulative, and that the defendant himself was in fraud, and was merely the trustee,

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holding the property for the benefit and use of Hall. Issue was joined upon these allegations, and the trial proceeded to judgment. The party cannot after appeal, or after issue joined, object that other parties ought to have been cited. This is one of the pleas that can only be made *in limine litis*. *Rothschild v. Bowers*, 2 Rob. 380.

But it is said that the defendant, being represented by a *curator ad hoc*, appointed by the court, is entitled to unusual indulgence, and that this court must consider as made, every objection that might have been made. The hardship of such a principle is obvious. If the objection is made on the trial, the opposite party has an opportunity of meeting it by other proofs, or of correcting any error or mistake; if made only after appeal, the irregularity is sprung upon him when it is too late to avoid it.

The curator, or attorney of an absent defendant, is appointed by the court, for the protection of one not present to select counsel for himself. After his appointment, he conducts the case as if he had been appointed by the party interested. He is competent to plead; to conduct the defence; to object to testimony, or to waive an objection, precisely to the extent that any other counsel may do, if employed by the party himself. He is not made an attorney in fact, with general and discretional powers; but he has powers as extensive as those conferred by any client on his counsel employed by himself. After being appointed, the curator acts as if employed by the party. If he did not, his appointment would be a snare. *Edmonson v. The Mississippi and Alabama Rail Road Company*, 13 La. 282. As to the parties necessary to a revocatory action, after judgment against the principal debtor, see arts. of the Civil Code, cited above. *Atwell v. Belden*, 1 La. 530. *Cole v. Bartlett*, 4 La. 132. *Regillo v. Lorente*, 7 La. 140. *Lambeth v. McMurray*, 15 La. 470. *Potier v. Harman*, 1 Rob. 525.

Mott, for the appellant, urged that the suit must be dismissed for the want of proper parties.

Smox, J. The plaintiffs, who represent themselves respectively to be judgment creditors of one J. J. Hall, for certain sums of money, amounting together to the sum of \$1727 40,

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with interest on the judgment rendered in favor of the plaintiff Hyde, and to the sum of \$4043, with interest on the judgment rendered by the Commercial Court in favor of the plaintiff Clapp, further allege in their petition that, about the time the debts were contracted, said Hall was possessed of considerable real and personal estate in the city of New Orleans, on the reputation of which, and his general credit, they, plaintiffs, were induced to trust him for large quantities of merchandize, &c.; that said Hall made said purchases with the deliberate intent to cheat and defraud the petitioners, by shipping said merchandize to Texas, by sending thither all his personal property and slaves, by himself personally absconding, and by withdrawing his real estate by false and simulated acts of sale from the pursuit of his creditors. They further state that, in accomplishment of his fraudulent purposes, he did execute false and simulated acts of sale of his real property, and prepared to abscond, when he was arrested by his creditors, confined in jail, and attempted to obtain his discharge by the insolvent laws, but failed in so doing in consequence of the numerous charges of fraud preferred against him; that he has recently succeeded in obtaining his release; and has left the State, without leaving any property standing in his own name, liable for his debts.

They further represent that, in pursuance of his fraudulent intentions, and about the time the debts above mentioned were contracted, said Hall, with the intent to defraud the plaintiffs, executed before a notary public, on the 25th of July, 1839, an act of sale to one C. C. Hall, of certain property described in the petition; that C. C. Hall was the brother, or near relative of the petitioners' debtor; was concerned with him in the conspiracy to defraud the creditors; and soon after absconded also, largely indebted and insolvent, leaving with his wife a power of attorney to sell the said property. That his said wife shortly after passed another act of sale of said property to another individual, also a relative or connection of Hall, who, still more effectually to withdraw said property from the pursuit of Hall's creditors, on the 14th of July, 1840, passed another act of sale thereof to the defendant Craddick, who is also a relative of J. J. Hall and C. C. Hall. They further aver that all said acts of

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conveyance are false and simulated; that the consideration therein mentioned had no real existence; that the property, though held in the names of the several vendees, is still the property of J. J. Hall, and liable for the payment of his debts; and that the petitioners' judgments rendered on the 23d of May, 1840, were duly recorded in 1841, so as to operate as a judicial mortgage on the said property; and they pray that Craddick, who resides in Mississippi, may be cited; that the several acts of sale be decreed to be null and void; and that the property be adjudged to be still the property of J. J. Hall, liable to be seized and sold to satisfy the said judgments, &c.

A curator *ad hoc* was appointed to represent the defendant Craddick, in whose name an answer was filed, denying all the allegations of the petition going to affect the defendant's title to the property therein described; and denying specially all simulation and fraud as charged by the plaintiffs in the transfer of said property from the several vendors and vendees therein named, and specially for himself averring that he has a just, legal and valid title thereto, &c. The curator *ad hoc* subsequently pleaded the prescription of one year.

All the different acts of sale alluded to in the plaintiffs' petition were produced in evidence; and after an investigation of the facts of fraud relied on as the basis of the present action, as alleged against the debtor J. J. Hall, and the several vendees of the property, judgment having been rendered in favor of the plaintiffs, declaring all said acts simulated and fraudulent, and ordering the property to be sold and applied in satisfaction of the debts due to the plaintiffs on their judgments, the defendant Craddick appealed.

Before proceeding to the examination of the legal questions raised in this case by the defendant's counsel, in his written arguments in opposition to the plaintiff's right of maintaining this action, we have first to dispose of a motion made by the appellees' counsel to dismiss this appeal, on the ground that the record is incomplete, and that the omission cannot be supplied in the manner the defendant and appellant has attempted to do.

The certificates of the clerk and of the district judge specify that all the documents filed, and testimony adduced on the trial

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below, are contained in the record, except the records of certain suits which were offered in evidence on the trial, but no transcripts of which were filed in the lower court.

It appears that those records were produced in evidence by the plaintiffs; that they were noted by the clerk as offered in evidence by the plaintiffs, but that neither the originals, nor copies were filed in the cause, so as to be included among the documentary evidence necessary to complete the record. The appellant's counsel states in his brief, that after calling on the attorneys of the appellees, and asking them to allow the records to be used in the original in the Supreme Court, he procured copies of the suits referred to at his own expense, and filed them as part of the record in this court; and we find also in the record a written agreement, signed by both counsel, by which it is declared, *that the appellees' attorneys have no objection to make, to the copies filed as above stated in the Supreme Court being taken in lieu of copies now to be made by the clerk; but, with the express reservation, that no right whatever of the plaintiffs is waived to move for dismissal of appeal on any other ground whatever.*

It cannot be controverted that it was the appellees' duty to file in the lower court copies of the documents by them produced in evidence, and that they were bound to do so, at least on being apprised of the appeal, or on being called on for that purpose by the appellant's counsel; their failing to comply with the request of the latter, when made in due time, might produce an injury to their adversary, by not putting it in his power to bring up his case before this court; and, under such circumstances, we are not prepared to say that he should be left remediless, and that his appeal should be dismissed, without giving him the benefit of a writ of *certiorari*; or, in case of the appellees' not filing the documents called for on the issuing of the writ, that the suit should not be remanded for a new trial. It seems here that the appellant has done all that he could, to put his case in a situation to be tried on the appeal. He has procured copies of his adversaries' written evidence at his own expense, and, we think that, under such circumstances, and particularly under the terms of the agreement of the counsel above recited, which amounts at least to an admission that the copies

filed are correct, since *they are to be taken as copies made by the clerk*, justice requires that the motion made for dismissing this appeal should be overruled, as the record is now in such a state as to permit us to examine the case on its merits.

Among the questions submitted to our consideration, the first which it becomes proper and necessary to notice, is, whether this suit, which is a revocatory action, can be maintained against Craddick alone, without making all the previous vendees, *against whom the fraud is alleged*, parties to the controversy? Or, in other words, whether the sales under which Craddick holds the property sued for, can be annulled, in the absence of the vendors and vendees through whom he derives his title thereto from J. J. Hall, the plaintiffs' alleged fraudulent debtor?

From the allegations of the petition it appears, that the present action is based upon certain facts of fraud, imputed not only to J. J. Hall, the debtor, but also to C. C. Hall, his first vendee, and to the intermediate and subsequent purchasers of the property, who are all accused of having been concerned in the conspiracy to defraud J. J. Hall's creditors. It is averred in the petition, that *all the acts of sale are false and simulated*, that the considerations therein mentioned had no real existence, and that the property, *though held in the names of the several vendees*, still belongs to J. J. Hall, and is liable for the payment of his debts; and thus, the object of this action being to annul and set aside all the different conveyances which stand in the way of the exercise of the plaintiffs' rights on their debtor's property, it is obvious that the annulling of Craddick's sale alone would not, so long as the other sales should be permitted to have their effect, attain the views of the plaintiffs, as they could not perhaps have the property seized and sold as belonging to J. J. Hall. For this purpose they have prayed that all the several acts of sale be decreed to be null and void, and Craddick alone has been cited to answer their demand.

The exception of non-joinder was not pleaded below, and the plaintiffs' counsel has contended that it is now too late to urge it. But the record shows that Craddick has not answered personally, and is only represented by a curator *ad hoc* appointed by the court; and as said curator cannot be permitted to waive

any of the legal rights of the party he represents, and, above all, as a judgment rendered in the absence of the interested parties, without their having been duly cited, could never have any legal force and effect against them, we feel bound to consider the exception as if it had been originally and specially pleaded, for our disregarding it would not give any greater force or validity to the judgment appealed from, if maintained on this ground, for want of a formal and special exception. It is clear that, if the intermediate sales cannot be declared void, in the absence of the parties therein interested as vendees, the judgment, as to them, would be a mere nullity.

We think that, under the allegations and prayer of the petition, all the intermediate vendees of the property should have been made parties to this suit, and that it cannot be maintained against Craddick alone, who is a non-resident, and only represented by a curator. It is true that, under the authority of art. 1970 of the Civil Code, we have often recognized the doctrine, that a creditor who wishes to institute a revocatory action, must either have his debt liquidated by a judgment, or make the purchaser of the property of his debtor a party to the suit for the liquidation of his claim; and, in some instances, that the necessity of making the original debtor a party to the revocatory action, only exists where the debt has not been previously liquidated by a judgment; and that, in this case, the plaintiffs sue as judgment creditors of J. J. Hall. See 1 La. 503. 4 La. 132. 7 Ibid, 142. 15 Ibid, 470. 1 Robinson. 525. But here, the question is not whether it was necessary to make J. J. Hall, the original debtor, a party to this action, for, as to him, the plaintiffs have done what they were bound to do. Civil Code, art. 1967. The enquiry is, whether all the subsequent and intermediate vendees of his property, alleged and considered by the plaintiffs in their petition *as his fraudulent vendees*, should not all be joined in an action brought *to annul all the sales*? Fraud is alleged against them in collusion with the debtor—must they not have an opportunity of rebutting those allegations? They are treated in the petition as a gang of conspirators, whose object, in transferring the property from one to the other, was to defraud the plaintiffs? Shall they be declared

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to be so, without being allowed to deny the charge, and to show not only the falsity of the allegation, but also the nature, legality, and legitimacy of the transactions? Shall they be condemned without being heard, and this by a judgment rendered contradictorily with a curator *ad hoc* appointed to represent an absentee? Certainly not. Again, without showing the fraud alleged, as having existed in the origin of the transaction; without proving that the first sale and the subsequent ones down to that to Craddick, were tainted with the same fraud and collusion, it is clear that the plaintiffs can never succeed in taking the property from Craddick's apparent ownership and possession. The averments of the petition, which are the basis of the action, go to show that the several acts of sale complained of were one and the same fraudulent and collusive transaction, in which all the vendees were concerned; they are charged with the fraud and conspiracy, as if they had all joined in the same act, performed in different parts, and at divers periods; they are represented to be J. J. Hall's vendees; and it seems to us that, viewed in this light, they should have been made defendants, in the same manner as if they had become the fraudulent purchasers of the property in and by only one act. /

With this view of the first question presented, it is clear that this action cannot be maintained; and it is, therefore, unnecessary to express any opinion on the other points of the case.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that ours be for the defendant as in a case of non-suit, with the costs in both courts.

 Valderes, Executrix, &c. v. Bird and others.

MARIA THERESA EULALIE VALDERES, Testamentary Executrix of
 Vincente Sebastian Pintado, deceased, and Natural Tutrix of
 his minor children v. ABRAHAM BIRD and others.

Where a formal decree of a court of Probates, recognizing the necessity of selling the property inherited by minors, for the payment of the debts of the succession, was rendered after giving an opportunity to the attorney of the absent heirs to show that no such necessity existed, a purchaser of the property will not be bound to look beyond the decree.

Where the sale of the property of a succession is made for the payment of debts, it may be sold for less than the appraised value.

Want of sufficient time for advertising between the date of the judgment of a court of Probates ordering the sale of the property of a succession and the sale, is a defect cured by the lapse of five years. It is such an irregularity as the act of 10 March, 1834, relative to advertisements, was made expressly to remedy. See sect. 4. The act applies to proceedings and sales previous to its passage; but the prescription of five years runs only from the date of the act, as to anterior defects and informalities.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

G. B. Taylor and Labauve, for the appellant.

Elam, for the defendants.

GARLAND, J. The plaintiff in her capacity of executrix and tutrix, claims a tract of land of four *arpents*, and a fraction front, on the left bank of the Mississippi, by the depth of forty *arpents*, and a back or double concession of the same width and depth, which Vincente Sebastian Pintado, in his lifetime, purchased of one Baptiste Boullion, on the 15th of December, 1804. The defendants claim the land under an alleged probate sale, made under the authority of the Court of Probates of the parish of East Baton Rouge, at the instance of Diego E. Pintado, who had been appointed curator to the absent heirs of Vincente S. Pintado, deceased, and also under the plea of prescription.

The facts are, that V. S. Pintado died in Havana, in the year 1829, leaving a widow and four minor children residing there. He left a will in which the widow is named executrix and tutrix of the minors. In the month of March, 1831, Diego E. Pintado, who states himself to be a brother of the deceased, presented a petition to the Court of Probates of East Baton

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Rouge, in which he says, that Vincente had died in the island of Cuba, but owned real estate in that parish. He states, that a widow and four heirs have been left in the city of Havana, naming them, and that they have rights in the succession; and he prays that he may be appointed *curator of the absent heirs* of the deceased. An attorney was appointed to represent the absent heirs aforesaid, and, after notice of the application, Diego E. Pintado was appointed as prayed for. About five weeks after this appointment, the curator of the absent heirs filed a petition against their attorney, in which he states, that "the time prescribed by law to pray for a sale of the real estate in like cases had expired, and that active debts of the succession require a sale, as will more particularly appear by the annexed schedule;" that there are no movables or slaves belonging to the succession, and that the real estate being situated on the Mississippi, and the levée being in bad condition, great loss is likely to ensue. The list of debts are, the fees of the clerk of the Probate Court, \$10 87; the fees of the Probate Judge, \$12 50; notarial fees and costs of sale, about \$60; and a sum for repairing the levée, estimated at \$50. An answer was filed to this petition by the attorney of the absent heirs, and a judgment given, directing the land in controversy to be sold, for one-third cash, and the other two-thirds on certain terms of credit, which was subsequently done, and the defendants became the purchasers; and, as it appears from the record, paid the price to Diego E. Pintado. This sale took place on the 7th of June, 1831, and the defendants have had possession ever since under it. The judge below, in his judgment, says, that the plaintiff has failed to make out such a case as can disturb the possession of the defendants, as the prescription of five years, under the act of March 10th, 1834, covers the informalities of which the plaintiff complains; wherefore he decides against her. She has appealed.

The Civil Code (arts. 1105, 1106 *et seq.*) authorizes the Court of Probates, "when any one dies leaving a vacant succession, or heirs absent from and not represented in the State," to appoint curators to such vacant estates, or absent heirs. The mode of applying for, and of appointment to such curatorships, is the same; and their duties are similar. In the case before

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us, the records from the Probate Court of East Baton Rouge show that Diego Pintado gave bond and security as required by law; and the judge certifies, in the certificate of appointment, that all the legal requisites had been fulfilled. The petition praying for the sale of the property, was served on the attorney for the absent heirs, who filed an answer, and the court decreed the sale to be necessary for the payment of the debts and the preservation of the property. This the court had authority to do, under the Code (arts. 1155, 1156, 1157); and it is not for us to revise or annul its judgment collaterally, however improperly or unadvisedly the judge may have, apparently, acted. In this case, we see no cause at all in the record before us, for a sale of the land in controversy; but it was judicially ordered and sold, and the time for an appeal has elapsed, and we must give effect to the proceeding.

All the informalities alleged, except one, preceded the judgment ordering the sale. With them, so far as the defendants, who are purchasers, are concerned, this case cannot be distinguished from several others decided by this court. It is now well settled, that where there is a formal decree of the Court of Probates, recognizing the necessity of selling the property inherited by minors for the payment of debts of the succession, and giving an opportunity to the attorney of the absent heirs to show that in fact no such necessity existed, the purchaser is not bound to look beyond the decree. 11 La. 149. 13 La. 431. It has also been repeatedly held, that when the sale is made to pay debts, the property may be sold for less than the appraisement.

The want of sufficient time for advertising, between the rendition of the judgment of the Court of Probates and the sale, is a defect, which the act of 1834, relative to advertisements, was expressly made to remedy. The plea of prescription must prevail as to that.

The counsel for the plaintiff contend, that the act of 1834 has no application to proceedings and sales previous to its adoption. We think otherwise. The prescription of five years would probably not commence to run, except from the date of the law, in relation to anterior defects and informalities. 2 Rob. 374. 1 Ibid, 331.

Judgment affirmed.

Dumas and others v. Lefebvre and another.

DUMAS and others v. ELIZABETH LEFEBVRE and another.

To maintain a revocatory action to annul a contract for fraud or simulation, it is necessary to make the original debtor a party to the suit, only where the debt has not been previously liquidated by a judgment. C. C. 1970.

In an action by a judgment creditor to rescind a sale of property made by his debtor as fraudulent or simulated, the vendee, when not a party to the judgment, may contest the plaintiff's demand in the same manner as the debtor might have done before judgment. C. C. 1971.

Where a judgment has been rendered in favor of the plaintiffs, in a revocatory action to rescind a sale on the ground of fraud and simulation, and the vendor alone appeals from the decision, the vendee must be cited as an appellee, or the correctness of the judgment cannot be inquired into, and the appeal must be dismissed. So the latter should be made an appellee, where the judgment having been against the plaintiffs, the latter appealed.

APPEAL from the Court of Probates of New Orleans, *Maurian, J.*

Benjamin and Micou, for the plaintiffs.

Grymes, for the appellant.

SIMON, J. This is a revocatory action instituted against the vendor and vendee of certain slaves, which the plaintiffs seek to have seized and sold to satisfy the judgment by them previously obtained against their debtor. They state in their petition, that having obtained a judgment in the Commercial Court against Elizabeth Lefebvre on the 20th of December, 1841, their debtor is unable to pay the debt, and that they can find no property in her possession, by the seizure of which they can obtain payment of their judgment. That on the day the debt was contracted, their said debtor was the owner and possessor of certain slaves, which she subsequently sold by a notarial act to Bernard Lefebvre, her son, for a price or consideration stated in the act to be \$2,400 in cash; that the said sale was simulated, fraudulent and void, as the sole object and motive thereof was to place the property beyond the reach of the vendor's creditors, and thus deprive them of the means of enforcing the payment of their just claims against her. Wherefore, they pray that the conveyance of said slaves be cancelled and annulled, and that on their being sold, the proceeds thereof may be applied to the satisfaction of their said judgment.

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A judgment by default having been entered against both defendants, issue was joined by the vendor, who answered by denying all the allegations contained in the plaintiffs' petition; and the case having been tried upon its merits, as against both defendants, judgment was finally rendered below annulling the sale made by the mother to the son, and ordering the slaves to be seized and sold, and the proceeds thereof applied to the payment of the plaintiffs' judgment; and from this judgment, the vendor alone has appealed.

The first question which necessarily presents itself is, whether on the appeal of the vendor, and in the absence of the vendee of property, alleged, in a revocatory action, to have been conveyed by a fraudulent and simulated sale, we can enquire into the correctness of the judgment which annuls such a sale? Or, in other words, whether it is necessary that both defendants in a revocatory action, against whom the fraud and simulation are alleged, and particularly the vendee, who is the principal party defendant in such an action, should be before us, in order to authorize the reversal of the judgment appealed from, in case such should be our opinion; and could we properly maintain the sale as to the vendor, whilst the same should remain annulled as to the vendee?

It is first proper to remark, that the non-appealing of a party from a judgment rendered by a court of inferior jurisdiction, amounts to an acquiescence in such judgment; and that after the expiration of the legal delay for appealing, the judgment of an inferior court acquires the force of *res judicata*, and cannot, in any manner, be enquired into on an appeal therefrom. Thus, in this case, more than one year having elapsed since the judgment appealed from was rendered, it is clear that it is now definitive and conclusive as to Bernard Lefebvre, the appellant's co-defendant, and that the sale must, as to him, stand forever annulled.

Now, it is well settled in our jurisprudence, that, though a creditor who wishes to institute a revocatory action, must either have his debt liquidated by a judgment, or make the purchaser of the property of his debtor a party to the suit for the liquidation of his claim, (Civil Code, art. 1970,) the ne-

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cessity of making the original debtor a party to the suit for annulling his contract attacked on the ground of fraud and simulation, only exists when the debt has not been previously liquidated by a judgment. 1 La. 503. 15 Ib. 470. 1 Rob. 525, and *Hyde and another v. Craddick*, lately decided, *ante* p. 387. Here the plaintiffs' claim was already liquidated by a judgment, and there was clearly no necessity for making the appellant a party to the suit, which could have been maintained in her absence, and against her son alone, with as much propriety and legality, as if the suit had been instituted against both. The vendee of the property which is sought to be restored to the ownership of the debtor, in order to be applied to the satisfaction of his debts, has a right, notwithstanding the judgment, to controvert the plaintiff's demand, in the same manner as the debtor might have done before said judgment (Civil Code, art. 1971); and if the plaintiff succeeds in his action, the contract is to be avoided as to its effects on the complaining creditor, and the property, or its value to the amount sufficient to satisfy his claim, is to be applied to the payment thereof. Civil Code, art. 1972.

In this case, therefore, all that the law requires to be done, has been complied with. The purchaser of the property was made a party defendant to answer to the revocatory action. He thought proper to remain silent, and a judgment by default was taken against him. The case having been tried, a final judgment was rendered, annulling the sale complained of. The appellant's co-defendant submitted to the said judgment, and has not appealed; and it seems to us clear that, in the same manner as if this suit had been originally instituted against the appellant alone, without joining the purchaser of the property, the present action should have been dismissed in its inception. The appeal taken by the debtor alone, or against her alone, if the judgment had been the other way, cannot be maintained, and must also be dismissed. As we said in the case of *Farrar v. Newport*, 17 La. 348, the proper course to have been pursued in this case by the appellant, would have been to cite her co-defendant as appellee before this court, if he refused to join her in the appeal; and, all the parties being before us, to

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litigate their rights contradictorily, we should have then been enabled to inquire into the correctness of the judgment appealed from. Again, as the case stands, we cannot, in the absence of the principal party defendant, afford any relief to the appellant.

Appeal dismissed.

JOHN DAVIS v. NIMROD HOUREN and another.

Where a receipt has been given by the master of a steamer, acting as the agent of the owners, for firewood purchased for the use of his boat, the prescription of one year, established by art. 3499 of the Civil Code, against actions for the supply of wood or other things necessary for the construction, equipment, or provisioning of ships, steamers, or other vessels, will cease to run. Such a written acknowledgment places the claim on the footing of an ordinary personal debt, and subjects it to the prescription provided by art 3508. Where the acknowledgment was tacit, deduced from the acts of the debtor, the nature of the prescription is not changed, but the prescription itself is only interrupted, which will run anew from the date of the interruption.

APPEAL from the District Court of the First District, *Buchanan, J.*

Larue and Preston, for the plaintiff.

Wray, for the appellant.

MORPHY, J. This suit is brought to recover of the defendants, former joint owners of the steamboat Hudson, the value of seventy six and a quarter cords of wood, sold and delivered to them for the use of the boat, in November, 1840. George Heaton, one of the defendants, pleaded the general issue, prescription, and the want of an amicable demand. There was a judgment below in favor of the plaintiff against Heaton, and he appealed.

The prescription relied on by the appellant is that of one year, established by article 3499, this suit having been brought only on the 15th of May, 1843, about two years and a half after the delivery of the wood. The following article, 3500, provides that this prescription takes place, although there may have been a regular continuance of supplies, &c.; and that it ceases to run only when there has been an account acknowledged, a note, or a bond, or a suit instituted. The record shows that, on the

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12th of November, 1840, John McMullen, the captain of the Hudson, delivered to the plaintiff a receipt, or acknowledgment in writing, signed by him, for the seventy six and a quarter cords of wood delivered then or before that time, and that this receipt or acknowledgment, was endorsed and approved on the 5th of December, 1841, by Nimrod Houren, one of the part owners of the boat. It is further shown, that the partnership between the defendants was dissolved in the latter part of the year 1840;* that the wood, at the time it was delivered, was worth \$4 50 per cord; and that an amicable demand was made of Heaton, previous to the institution of this suit.

The appellant's counsel has contended that after the dissolution of a partnership, one partner cannot, by any acknowledgment of a debt barred by prescription, revive the same, and create a new cause of action binding against his co-partner. This, we believe, to be true; but the inquiry is, whether the plaintiff's claim falls within the prescription of one year under the articles above mentioned? We think that it does not. This short prescription ceased, in our opinion, to run from the date of the receipt given by the captain of the boat, who, *quoad hoc*, was the agent of the owner. Although this paper does not contain a statement, or account of the dates of delivery, the prices, &c., it is such a written acknowledgment or settlement for the quantity of wood delivered up to that time, as renders inapplicable the prescription invoked by the appellant, and places the claim upon the footing of any other personal debt. According to the commentators on the articles of the Napoleon Code, corresponding to those above quoted, the short prescription therein established, is based on a presumption of payment. In agreements which are usually made verbally, and in which cash is generally paid, it is not unreasonable to suppose, after a certain lapse of time, that the obligations resulting from such agreements have been satisfied; but this presumption does not exist where the creditor has a title, or written acknowledgment from his debtor. 2 Troplong on Prescription, Nos. 943 and

* In the latter part of the month of November of that year.

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989. The counsel for the appellant contends, that the receipt produced by the plaintiff, only interrupted the prescription of the year that was running against his claim ; that the same prescription still applies, and must be computed from the date of the receipt ; and we are referred to other passages of Troplong, 2 vol. pp. 263, 264. What the author there says, applies to the tacit acknowledgment of a debt resulting from the acts of the debtor. Such an acknowledgment does not change the prescription applicable to the debt ; it only creates an interruption, from the date of which the same prescription begins to run anew. In the present case, the receipt, or written acknowledgment of the captain, who was the agent of the owners, produces, in our opinion, the same effect as an account acknowledged ; that is, it takes the debt out of the prescription of one year, and places it under the operation of that established by article 3508 of the Civil Code.

Judgment affirmed.

PIERRE MICHEL v. WHITNEY VALENTINE and another.

Defendants, money brokers, having purchased a treasury note of the United States, at a certain rate, resold it to the plaintiff at a small advance. On previous sales of similar notes to plaintiff, defendants had always refused to guaranty or endorse them, and no such guarantee or endorsement was asked, or expressly give nor refused on this sale. The note being proved to have been cancelled, and put in circulation by one who had stolen it, in an action by plaintiff to recover of defendants the amount paid for it : *Held*, that the latter were bound to refund the amount ; that a vendor is always presumed to guaranty the genuineness of the paper he sells, or that any thing else which he offers is really what he pretends it to be ; and that his liability in this respect, if it can in any case be excluded, can be so only when expressed in the most positive manner.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* This was an action to recover the amount paid by the plaintiff for a treasury note of the United States, purchased of the defendants, money brokers ; payment of the note having been refused, on the ground that it had been cancelled by the government, and put into circulation by persons who had stolen it.

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The defendants answered by a general denial. The purchase of the note, as alleged by the plaintiff, was established. It was also proved that one of the defendants had acknowledged that the note had been cancelled.

Birdsall, a witness of the defendants, testified, that he was in their employment as a clerk, at the time of the transaction; that the plaintiff had previously purchased two or three other notes from the defendants; that on being asked by the plaintiff, at the time of his previous purchases, whether they would endorse or guaranty the notes, defendants invariably refused, stating that they assumed no responsibility on any of their sales, but merely sold for a brokerage. That, on the morning of the day on which the purchase was made, plaintiff called on the defendants to know whether they had any more treasury notes, and was informed that they had none then, but would have some during the day. That at a later hour, while a person was standing at defendants' counter, offering to sell them a treasury note at two per cent discount, and while they were hesitating whether to purchase at so small a discount, plaintiff came in. That the note was taken by one of the defendants from the person offering it, who stood at one end of the counter, and handed to the plaintiff at the other, who, on being asked, agreed to take it at $1\frac{1}{2}$ per cent discount. That the amount, deducting that discount, was taken from the plaintiff, and handed to the person who offered the note for sale. That defendants only made a half per cent by the transaction; and that a better rate of discount was allowed to the person who offered the note, because defendants had a purchaser for it.

There was a judgment below in favor of the plaintiff. The defendants appealed.

Morel, for the plaintiff.

Kennicott and *Frazer*, for the appellants.

MARTIN, J. The defendants are appellants from a judgment which condemns them to pay to the plaintiff a sum of money, the price of a treasury note, which they had sold him, it having been refused by the Custom-House, on the ground that it was one of several treasury notes which had been cancelled and stolen. The evidence shows that the plaintiff had been in the

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habit of purchasing treasury notes from the defendants, which they refused to guaranty and endorse. The plaintiff having called on them for the purchase of such notes, he was answered that they had not any. Returning afterwards to their office, at a time when one was offered to them for sale, he was informed that they could purchase it, and was asked whether he would take it at a discount of one $1\frac{1}{2}$ per cent. On his answering in the affirmative, the defendants purchased it at a discount two, and sold it to him at $1\frac{1}{2}$.

The general issue was pleaded. The identity of the note was proved, and the refusal of it at the Custom-House. The liability of the defendants as vendors of a cancelled treasury note has been established by a decision of the Commercial Court, affirmed by us. *Night v. Loufear*, 7 Rob.

Their counsel has rested their defence on the knowledge which the plaintiff had, that they refused to guaranty or endorse the treasury notes which they sold; the length of time between the sale, and the offer to return the note; the absence of proof of the cancelling of the note; and the knowledge the plaintiff had, that they acted as brokers, selling the property of another.

The court, in our opinion, did not err. A vendor is always presumed to guaranty the genuineness of the paper which he sells; and that any other thing which he offers, is really what he pretends it to be. His liability in this respect, if it can in any case be excluded, must be so in the most positive manner; and his exemption cannot be easily admitted. As the length of time relied on, does not enable the defendants to sustain the plea of prescription, it cannot avail. The testimony of Morel establishes the defendants' admission that the note had been cancelled. It is evident that the note became the property of the defendants, on their purchase of it on terms more advantageous to them than those at which the plaintiff acquired it. They did not, therefore, act as brokers in this transaction; a circumstance which increases their responsibility for the genuineness of the note, and distinguishes it from that of a broker, if it be admitted that the latter is not answerable for the genuineness of the paper he sells.

Judgment affirmed.

LOUISE JOSEPHINE BAUDUC v. PETER CONREY.

Plaintiff having enjoined the execution of a judgment of a justice of the peace, ordering the delivery of the possession of certain premises to defendant, on the allegation that the justice exceeded his jurisdiction, defendant moved to dissolve the injunction, on the ground that it would appear from a complete record filed by him, of the proceedings before the justice, that he did not exceed his jurisdiction. Plaintiff having objected to the admission in evidence of the record filed by defendant: *Held*, that defendant having asked that the injunction should be dissolved, not on the face of the petition, but on the allegation that the record produced by him would show that the justice had jurisdiction, the record was the basis of the motion to dissolve, and admissible as such.

Where on the dissolution of an injunction obtained by a party to arrest the execution of a judgment ordering him to deliver possession of certain premises, damages cannot be allowed under the third section of the act of 25 March, 1831, in consequence of their being no judgment on which they can be calculated, the right of the defendant in the injunction to sue for the damages on the injunction bond will be reserved.

APPEAL from the District Court of the First District, *Buchanan, J.*

Greiner, for the appellant.

Schmidt, for the defendant.

SIMON, J. The plaintiff is appellant from a judgment which dissolves an injunction by her obtained with the view of arresting the execution of a judgment rendered against her by W. T. Raynal, a justice of the peace of the parish of Jefferson, by which she was condemned to deliver to the defendant, within three days, possession of certain premises by her occupied in the city of Lafayette.

The grounds set up in the petition are : That the defendant, Conrey, instituted proceedings before said Raynal, by which he demands possession, *as owner*, of the said premises ; that the petitioner has been in possession of the same for more than one year ; that said premises are worth \$3000 ; that the jurisdiction of the court of the said justice of the peace is limited to personal actions not exceeding \$150 ; and that, notwithstanding the exception by her filed, which exception was overruled, final judgment was rendered against her by an incompetent court. An incomplete copy of the record of the proceedings had before the magistrate is annexed to her petition.

The defendant joined issue by stating, in substance, that he is the owner of the premises alluded to in the plaintiff's petition; that said property was by him rented to said plaintiff at the rate of \$15 per month, but that wishing to put an end to the tenancy of the plaintiff, he gave her notice to quit the premises; that the plaintiff refused to comply with this requisition; and that he was compelled to institute proceedings for the purpose of forcing her to leave them. He further gives a statement of the proceedings had in the magistrate's court, and prays that the injunction may be set aside, with damages, &c.

On the same day the defendant filed a written motion to dissolve the injunction, on the ground that, from a full and fair record of the proceedings had before the justice of the peace, it appears that the plaintiff's allegation of his being without jurisdiction, is unfounded. This motion prevailed below, and is now the subject of the present controversy.

On the trial of this case in the court below, the defendant offered in evidence the record annexed to his answer, showing the proceedings had before the magistrate. This proof was objected to by the plaintiff's counsel, on the ground that no evidence out of the petition for an injunction could be offered, but that such matters alone could be examined on the trial of the motion. The record was admitted, and the plaintiff took a bill of exceptions.

We think that the judge *a quo* did not err. The very document objected to was the basis of the motion to dissolve the injunction, and was properly received in support of it. The defendant did not pretend that the injunction should be dissolved on the face of the petition; but, on the contrary, positively alleged that the record by him produced would show that the plaintiff's allegation of the magistrate's being without jurisdiction is unfounded. It is also well remarked by the district judge, that the petition does not state the plaintiff to have been in possession of the premises as *owner*, and that the transcript annexed to her petition is not certified by the justice, Raynal.

On the merits of the motion, we are of opinion that the judgment complained of is correct. It is established by the record of the proceedings had before the justice of the peace, that the

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plaintiff was the tenant of the defendant; that she had paid him rent for the premises, which belonged to said plaintiff; and that due notice was given to her to quit the property. It is true the notice requires the plaintiff to deliver possession of the premises to defendant, as being his property, but this cannot be understood as being the exercise of a possessory action, since it is not based upon the adverse possession of said defendant. Code of Practice, arts. 47, 48, 49. The case was clearly within the jurisdiction of the magistrate, and the proceedings were had in the manner pointed out by the laws relative to landlords and tenants (Bull. & Curry's Digest, p. 539, § 2. Civil Code, arts. 2683, 2684), in conformity with which, the plaintiff was ordered to deliver possession of the premises to the owner thereof, within three days from the date of the service of the notification of the judgment.

With regard to the damages claimed by the appellee for the wrongful suing out of the injunction, we cannot allow any in this case, there being no judgment upon which they could be calculated; but we think that the right of the appellee to institute his action for damages upon the injunction bond should be reserved, since the effect of it has perhaps deprived him of the use of his property during the pendency of this suit. 17 La. 183. 19 Ib. 402. 1 Rob. 144. 2 Ib. 165, 209.

Judgment affirmed.

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DAVID AKIN v. SAMUEL W. OAKEY and others.

The 14 section of the act of Congress of 19 August, 1841, establishing an uniform system of bankruptcy, which declares, "that where two or more persons, who are partners in trade, become insolvent, an order may be made," declaring them bankrupts, "in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and all the separate estate of each of the partners, shall be taken," with certain exceptions, "and that the creditors of the company, and the separate creditors of each partner shall be allowed to prove their respective debts," &c., applies to the case of a partner in an existing partnership. It does not apply where the partnership had been dissolved previously to the application to be declared a bankrupt, made by one of its members who had been charged with the liquidation of the debts of the firm. In such a case the interest of the applicant alone vests in his assignees.

APPEAL from the City Court of New Orleans, *Collens, J. Livingston*, for the appellant.

Peyton and I. W. Smith, for the defendants.

BULLARD, J. Oakey & Co., having obtained a judgment against J. S. Turner, one of members of the late firm of Turner & Woodruff, caused their execution to be levied on the right, title and interest of Turner in certain assets, principally evidences of debt due to the late firm. Akin made opposition and enjoined the proceeding, on the allegation that the whole of the assets had become vested in the assignee of Woodruff, one of the partners, who had become a bankrupt, both individually and as a member of the firm, and that he (Akin) had purchased the whole of the assets, and all the right and title of the firm of Turner & Woodruff, at a marshal's sale, under the decree of the bankrupt court.

The City Court being of opinion that the interest of Turner did not vest in the assignee of Woodruff, and that it consequently did not pass by the purchase made by Aikin at the marshal's sale, dissolved the injunction, and Akin appealed.

It appears in evidence, that the firm of Turner & Woodruff had been dissolved, and that Woodruff was charged with the settlement of the concern, and had possession of the assets for that purpose some time before he went into bankruptcy. His authority as liquidator was not that of a partner: he had no power to dispose of the assets except in discharge of the liabili-

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ties of the firm, nor could he bind the partnership by any new engagements.

It has been contended, that the 14th section of the late bankrupt law provides for a case like the present ; we are, however, of opinion that it relates to existing partnerships : its language is, "that where two or more persons, *who are partners* in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or *any one of them*, or on the petition of any creditor of the partners ; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken," &c.; "and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts," &c. It goes on to point out the mode of distribution, in such a case, between the creditors of the partnership and those of the separate partners ; and finally declares that, "if there shall be any balance of the separate estate of each partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors ; and if there shall be any balance of the joint stock after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective rights and interests therein, and as it would have been *if the partnership had been dissolved without any bankruptcy ;*" &c.

This section evidently contemplates, we think, the case of a partner of an existing partnership going into bankruptcy, and provides for the administration, by his assignee, of all the assets for the benefit of the joint and separate creditors.

There is another strong reason for giving this construction to the act of Congress. It provides, that on the petition of one of the partners alone, not only all the partnership effects, but all the separate property of one of the partners who does not petition, shall be taken and subjected to the administration of the assignee.

Such was in substance the principle recognized by this court in the case of *Claiborne et al. v. Their Creditors*, 13 La. 279. See, also, *Tyler v. His Creditors*, 9 Robinson, p. 372.

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The interest which vested in the assignee of Woodruff was precisely such as he had when he went into bankruptcy; and so far as relates to Turner's interest, he was acting as a mandatary for purposes of liquidation, and not as partner. Akin acquired under the sale only the interest vested in the assignee.

Judgment affirmed.

SAMUEL GUSTINE v. THE UNION BANK OF LOUISIANA.

An accommodation endorser of a note will be discharged by any agreement between the holders and one of the drawers, amounting to a novation of the debt (C. C. 2194), or by which a prolongation of the term of payment is accorded to the latter. Ib. 3032.

A resolatory condition is implied in all synallagmatic contracts.

Where the legal effect of an agreement between the holder and one of the drawers of a note was to release an accommodation endorser, the rescission of the agreement may revive the original obligation of the drawer who was a party to it, but cannot revive that of the endorser, who was not a party thereto. C. C. 2038, 2040, 2041.

No reservation in a contract by which the holder of a note agrees to an extension of time in favor of the drawer, can prevent the discharge of an accommodation endorser, not a party to the contract. *Per Curiam*: The reservation is inconsistent with the very agreement containing it. While the agreement releases the principal debtor from a compliance with his original obligation, the reservation has for its object to insist upon its performance by the endorser.

A surety is bound for the same thing as his principal, and cannot be bound under more onerous conditions (C. C. 3006); and no reservation which a creditor can make in a contract containing a novation of the debt, or allowing an extension of time to the principal debtor, can preserve his rights against a surety not a party to the contract.

A judgment obtained against a surety does not change the character of his debt, nor his relation to the principal debtor; and a prolongation of time granted to the latter will release the former, in the same manner as if no judgment had been obtained. The judgment creditor can do no act, whereby the rights or recourse of the surety against the debtor may be destroyed or impaired. If he make a novation, or grant time to the principal debtor, the surety is as effectually discharged, as if the judgment had been satisfied. C. C. 2194, 3022.

A judgment neither creates, adds to, nor detracts from the debt of the party against whom it is rendered. It only declares its existence, fixes its amount, and secures to the creditor the means of enforcing its payment. If the debt create a privilege or tacit mortgage, they exist independently of the judgment.

APPEAL from the District Court of the First District, Buchanan, J.

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R. N. and A. N. Ogden, for the appellant. As to plaintiff's right of action to relieve his property from the mortgage existing on it, see *Flower v. Hagan*, 2 La. 223. The surety is discharged by any extension of time granted to the principal debtor, without his assent, notwithstanding any reservation made by the creditors. 7 Toullier, No. 314. *Calliham v. Tanner*, 3 Rob. 299. *Louisiana Bank v. Dubreuil*, 5 Mart. 416. *Abat v. Holmes*, 3 La. 352. *Lobdell v. Nephler*, 4 La. 295. 9 Wheaton, 680. Civil Code, arts. 3030, 3032. *Bank of the United States v. Hatch*, 6 Peters, 250. 12 Wheaton, 554. *King v. Baldwin*, 2 Johnson's Ch. Rep. 554. 16 La. 218. Bayley on Bills, 284. An accommodation endorser is a mere surety. *Nolte v. His Creditors*, 7 Mart. N. S., 12. *Dorsey v. His Creditors*, 7 Ib. N. S. 499. *Louisiana State Bank v. S  n  cal*, 10 La. 31. *Hereford v. Chase*, 1 Rob. 212. A novation of the debt discharges the surety on the original obligation. 7 Toullier, 328. Chitty on Bills, 292. 1 Mason's C. C. Rep. 323. *Morgan et al. v. Their Creditors*, 1 La. 527. Numerous English and American authorities, establish the discharge of an endorser under the circumstances of this case. See *English v. Darley*, 2 Bos. & Pul. 61. *Wood v. Jefferson Bank*, 9 Cowen, 195. Theobald on Principal and Surety, 129, 130, 144, 145. 3 Bos. & Pul. 363. *Whithall v. Masterman*, 2 Camp. N. P. C. 178. 18 Vesey, 20.

H. R. Denis, for the defendants.

MORPHY, J. This action was instituted to obtain the erasure of a mortgage resulting from a judgment rendered in favor of the Union Bank of Louisiana against the petitioner, as endorser of a note for \$20,699 22, dated the 12th day of April, 1839, and payable to his order, twelve months after date, by Bullitt, Ship & Co. in liquidation, John Routh, Austin Williams, Joseph C. Ferriday, and Robert Ferriday, as joint and several drawers thereof. The petition alleges that, subsequently to the rendition of this judgment, to wit, on the 12th of May, 1841, the Union Bank entered into an arrangement with John Routh, one of the drawers *in solido*, whereby he acknowledged himself indebted to them, in the sum of \$99,202 41, which indebtedness, it was stated in the notarial act passed between the parties, arose out of six several promissory notes, among which was the note on

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which a judgment had been obtained against the petitioner ; that Routh executed his bond, or obligation in favor of the bank for the aggregate amount of all these notes, and secured its payment by a mortgage on certain property and slaves, described in the act ; and that it was stipulated that Routh should have the right to pay, and curtail his bond by yearly payments, each payment to be of one-eighth part of the whole amount of it, and interest on the remaining balance at the rate of seven per cent per annum, during the space of eight years from the date of the act of mortgage. The petitioner further avers that the bank, having incorporated the notes on which the plaintiff was endorser with other debts due to them, with which he had no connection, and having granted an extension of time by giving Routh eight years to pay the whole amount, have lost all recourse upon him (plaintiff), who was only a surety on the note he endorsed, because such extension of time was granted without his consent, and he has a right to demand a release of the judicial mortgage recorded against him. The defendants aver that the plaintiff cannot maintain the present action unless he first satisfies the judgment in their favor ; that they have done no act which authorizes a release of said judgment ; and that as soon as the plaintiff shall have paid the amount of it, the note endorsed by him will be delivered to him, and he will be subrogated, to the rights of the bank against the drawers thereof. Assuming the character of plaintiffs, in reconvention, the defendants pray for a judgment against Samuel Gustine, as the endorser of another protested note for \$24,436 67, drawn to his order by Bullitt, Ship & Co., in liquidation, John Routh, Austin Williams, Joseph C. Ferriday, and Robert Ferriday, dated the 12th of April, 1839, and payable thirty-six months after date. To this reconventional demand, the plaintiff answered, by averring that the note upon which it was based, is one of the notes endorsed by him, which are described in the act of mortgage executed by Routh in favor of the bank, and for the payment of which they granted him an extension of time of eight years, thereby discharging the plaintiff's liability as an endorser thereon. There was a judgment of non-suit below in the principal suit, and upon the reconventional demand, the judge be-

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ing of opinion that a clause in the mortgage, whereby Routh bound himself to procure, within the shortest possible delay, the renunciation of his wife of all her rights upon the property mortgaged, formed a suspensive condition of the agreement to give time, and that, until its performance, the rights of the parties to the contract, remained in abeyance. The plaintiff appealed.

From the act of mortgage executed on the 12th of May, 1841, it appears that the two notes above described, and a third one for \$22,413 15, drawn by the same parties, and endorsed by the plaintiff, formed, with other notes, and a draft due to the bank by Routh, the sum of \$93,508 51, to which was added, the further sum \$5,693 90, for costs of protest and interest at the rate of seven per cent per annum, calculated on the notes due, up to the 10th of February, 1842. To secure the aggregate amount of principal and interest, Routh executed to the bank his bond, with a mortgage on a plantation in the parish of Concordia, and on seventy-five slaves, and was allowed a credit of eight years to pay the same, with the privilege of deferring the payment of the first instalment until the 10th day of February, 1843, by paying interest on the whole amount of the obligation at the rate of seven per cent per annum, for one year. The contract thus entered into between the bank and Routh, might well be considered as a novation of the former debt; but whether it be so considered, or whether it be viewed only as a prolongation of the term for payment, its legal effect on the obligation of the plaintiff, as an accommodation endorser, was the same. It completely discharged him. Civil Code, arts. 2194, 3032. He cannot consider the clause in relation to the renunciation of Routh's wife, as forming a suspensive condition of the agreement to give time. It does not appear either from the words of the instrument, nor from the acts of the parties, that they intended to make the existence of the agreement depend upon the fulfilment of the obligation to procure the renunciation. The act was perfected, and a few days after recorded in the parish of Concordia, where the mortgaged property was situated. It took effect immediately in favor of the bank, and protected them from the operation of other mortgages and liens subse-

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quently recorded against their debtor. Routh's failure to comply with his undertaking in this respect, may entitle the bank to demand the rescission of the contract, after putting him in default; but it will be the rescission of an existing agreement by virtue of the resolatory condition which is implied in all synallagmatic contracts. If the legal effect of the new agreement was to release the surety, its rescission may well revive the original obligation of Routh, but could not restore that of the surety, who was no party to such agreement. Civil Code, arts. 2038, 2040, 2041. 7 Toullier, Nos. 306, 315.

The counsel for the defence has made two points in this court:

1st. That the bank, in their contract with Routh, reserved their rights against the plaintiff, and that, therefore, the latter was not discharged by the extension of time they granted to their debtor.

2d. That after judgment against a surety, he becomes an absolute debtor, and can no longer be viewed in the light of a surety, and claim be benefit of the rules which govern the contract of suretiship.

I. The clause relied on by the bank, as containing a reservation of their rights against the plaintiff, is in the following words, to wit:

"Whereas the said John Routh has offered to grant the foregoing mortgage and security, for his individual liability resulting from the said notes and drafts, without prejudice to the rights which the bank may choose to exercise against the other parties thereto, for the purpose of obtaining a more prompt settlement of the said notes and draft; and whereas the said Union Bank of Louisiana, and the said John Routh have agreed, in the event of the said notes and draft failing to be paid in part, or in *toto*, by the other parties, then and in that case the said notes and draft shall belong to the said Routh, after he shall have paid the whole amount of the said obligation. Now, therefore, it is hereby expressly agreed and stipulated, that the notes and draft, or whichever of them shall not have been paid by the other parties thereto, shall remain in the possession of the bank during the continuance of this mortgage, and that the same shall belong

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and be delivered over to the said John Routh, so soon as his said obligation shall have been paid, to be used by him as he shall think fit; and all such sums as may be received by the bank on account of the said notes and draft, shall be applied to the credit of the said John Routh's obligation." This stipulation, when coupled with a previous part of the act, wherein Routh reserves his right to recover of the other parties to the notes and draft, after he shall have paid the bank, would seem to relate only to those parties against whom he would have a recourse to exercise after taking up his bond. The object apparently was, that the notes and draft not paid by such other parties, should be kept by the bank, and delivered to Routh as soon as his obligation was paid, to enable him to exercise such recourse. The plaintiff, who was only a surety, was not one of those parties; but admitting that this clause can be construed into a reservation of the rights of the bank against him, such a reservation in a contract to which he was not a party, cannot destroy the legal and immediate effect of the contract itself. Such a reservation is contrary to, and incompatible with the obligation of a surety, who is bound for the same thing as the principal debtor, and cannot be bound under more onerous conditions. Civil Code, art. 3006. If a new contract intervene between the latter and the creditor, whereby an obligation different from that to which the surety acceded, is substituted to it, the liability of the surety is at an end, and no reservation can operate so as to revive it. A reservation of this kind is, moreover, inconsistent with the very agreement which contains it. While the agreement dispenses the principal debtor from the performance of his former obligation, the reservation has for its object to insist upon its performance by the surety. The latter, upon paying the debt, would naturally call upon the principal debtor for immediate reimbursement. If the debtor, by reason of the reservation is bound to pay, he loses the benefit of the agreement which becomes a nullity. If, by reason of the agreement giving time, he is not bound to pay, the reservation amounts to nothing, and the surety is discharged, as he cannot be subrogated to the rights of the bank under the obligation to which he acceded. Thus it is seen that either the agreement itself, or the reservation must

eventually be treated as a nullity; and of the two, says a distinguished writer on this subject, it is more reasonable to regard the reservation as a nullity, because it was not assented to by the surety. Theobald, on Principal and Agent, p, 144, and the authorities there quoted.

In speaking of the extinction, by novation, of a surety's obligation, which under our law is as effectually destroyed by an extension of time granted to the principal debtor, Toullier says: "*Quelque stipulation, quelque réserve, que le créancier puisse insérer dans le contrat de novation, en l'absence du fidéjusseur, il se fait à l'égard de ce dernier, une extinction totale, et non pas une suspension de son obligation.* Vol. 7, No. 314. "Car," says the same author in another place, "une protestation ne peut empêcher l'effet nécessaire et essentiel d'un acte. C'est un principe constant, que toute protestation et réserve contraire à la substance même de l'acte où elle est contenue n'est d'aucune considération lorsque celui qui l'a faite pouvait agir autrement. No. 308. We conclude then, that no reservation which a creditor can make, in a contract containing a novation of the debt, or allowing a prolongation of time to the principal debtor, can preserve his rights against the surety who was not a party to such contract:

II. In relation to the effect of the judgment rendered against the plaintiff, this court held, in *Calliham v. Tanner*, that a judgment obtained against a surety did not change the character of his debt, nor the relation in which he stood to the principal debtor; and that a prolongation of time granted to the latter released the obligation of the former, in the same manner as if there was no judgment against him. 3 Rob., p. 299. Upon further reflection, we have no reason to be dissatisfied with the opinion then expressed. A judgment does not create, add to, nor detract, from the indebtedness of a party; it only declares it to exist fixes its amount, and secures to the suitor the means of enforcing payment. If under the law, the debt creates a privilege or tacit mortgage, such privilege or tacit mortgage exists independent of the judgment rendered upon it. When a creditor obtains a judgment against the principal debtor and the surety, both are, to be sure, equally and absolutely bound for the debt; but why is it

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that a payment of the judgment by the principal debtor releases the surety, or that a payment of it by the surety subrogates him to all the rights of the judgment creditor against the principal debtor? It can only be because the relation of principal and surety continues to subsist between them even after judgment. If so, the judgment creditor can do no act, whereby the rights or recourse of the surety against the debtor may be destroyed or impaired. If he make a novation, or grant time to the principal debtor, the surety is as effectually discharged as if the judgment had been satisfied. Civil Code, arts. 2194, 3032.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that the judgment obtained by the Union Bank of Louisiana against Samuel Gustine, rendered on the 22d of December, 1840, be and remain without effect; and that the judicial mortgage, resulting from its registry in the office of the parish judge of Concordia, be cancelled and erased; and it is further ordered, that the reconventional demand set up by the defendants be dismissed. The appellees to pay the costs in both courts.

PLEASANT H. HARBOUR v. ROBERT G. BRICKEL and others, Owners of the steamer Chieftain.

The jurisdiction of the Supreme Court attaches as soon as the appeal bond is filed, and the citation of appeal has been issued; and the court of the first instance can take no further steps in the case, except such as may be necessary to transmit the record to the Supreme Court. C. P. 883.

The time allowed for the return day of an appeal cannot be extended by the court from which the appeal was taken, but only by the Supreme Court; and on the failure of the appellant to file the transcript, or to apply to the Supreme Court, within three judicial days after the return day, for an extension of the time, the appellee will be entitled to an execution, under art. 589 of the Code of Practice.

This was an application for a mandamus to *Buchanan*, judge of the District Court of the First District.

Perin, for the application.

Van Matre, contra, cited act 20th March, 1839, § 19 (B. & C.'s Dig. 181). *Desorme's Heirs v. Desorme's Curator*, 15 La. 15. 17 La. 111. *Winchester v. Ory's Syndics*, 15 La. 104.

MORPHY, J. The plaintiff's counsel moved for a mandamus to the judge of the First Judicial District, commanding him to permit an execution to be issued in this case. He represents that the defendants, against whom a judgment was rendered below, obtained an order of appeal which was made returnable in this court on the fifth Monday of March, 1845; that, on the 9th of April, after the lapse of more than three judicial days from the return day, he obtained from the clerk of this court a certificate that the transcript had not been filed; that he presented this certificate to the district judge, who refused to permit an execution to be issued, on the ground that, on the 3d of March last, he had made an order to extend the delay for filing the appeal in the Supreme Court to the fourth Monday of April. On the day that this application was made, the counsel for the defendants moved for leave to file the record of their appeal. As a reason why it had not been brought up within the legal delay after the return day, he suggested that, on receiving from the clerk below the petition and citation of appeal, C. M. Randall, Esq., who was acting on his behalf (he being at the time, and long after, confined to his bed by inflammatory rheumatism), conceiving that the judge had not allowed sufficient time between the order of appeal and the return day to transmit the petition and citation of appeal to the parish of Pointe Coupée, and to have them served on the appellee in time to give him the delay allowed by law for answering thereto, applied to the appellee's counsel for him to accept service of the petition and citation of appeal; that, upon his refusal so to do, believing that the judge below had power to correct the error, and to extend the return day, so as to allow the appellee the legal delay for answering, he applied to said judge, who, upon a suggestion of the above facts, ordered the return day to be extended to the fourth Monday of April, 1845; and that, confidently relying on the validity of the order thus extending the return day of this appeal, he neglected to file the transcript, supposing that if it was filed on the return day mentioned in said order, it would be in time. From this showing of the appellants' counsel, nothing appears to have occurred to prevent the filing of the record in this court within the time

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required by law, except his belief that the judge below had the power to extend the return day. This belief we cannot admit as a sufficient excuse, after the repeated adjudications of this court on the subject. It has long since been settled, that the jurisdiction of the appellate court attaches as soon as the appeal bond is filed and the citation of appeal has issued, and that the court of the first instance has no longer any authority to take any steps in the case, except such as are necessary to transmit the record to this court; the second order, then, extending the return day from the fifth Monday of March to the fourth Monday in April, we are bound to regard as a nullity. 6 Mart. N.S. 464. 8 Ib. N.S. 440. 4 La. 205. 7 Ib. 448. 10 Ib. 482. 11 Ib. 190. Code of Practice, art. 883.

The case of *Desorme's Heirs v. Desorme's Syndic*, to which we have been referred by the appellants' counsel, is a very different one from the present: in that case, although the transcript was not filed on the return day, it was brought up before any certificate was given by the clerk of its not having been filed. The judge's order making the appeal returnable on a day on which this court was not to sit, was considered as a nullity, and could produce no effect. As was said in *Rains v. Kemp*, 4 La. 318, it was tantamount to allowing an appeal returnable on any day, or not returnable at all; and the judge, upon perceiving his error, immediately corrected it. In the present case, the first order of the court was legal, and had the effect of divesting it of its jurisdiction. If the time allowed was supposed to be insufficient, it could have been extended by an application to this court. The order of appeal was given on the 27th of February, 1845: with a moderate degree of diligence, the petition and citation of appeal might have been forwarded to Pointe Coupée early enough in March to have allowed the appellee the legal delay for answering; but, even admitting that the time was too short, this circumstance should not have prevented the record from being filed within the three days after the return day mentioned in the citation of appeal. This court would have allowed the appellee sufficient time to answer. The transcript not having been brought up on the return day, and no application for further time having been

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made within the three judicial days following, nothing, under the circumstances of this case, authorizes us to withhold from the appellee the right which he has, under article 589, to proceed with the execution of his judgment in the court below.

It is, therefore, ordered and decreed, that the judge of the District Court do allow the plaintiff to take out an execution under his judgment, or do show cause to the contrary on or before the 28th of this month, if he sees fit so to do.

ALEXANDER GRANT, Syndic of the creditors of Cornelius Hurst,
an Insolvent, v. JOHN S. HURST.

Questions of fraud and simulation are peculiarly within the province of a jury.

APPEAL from the District Court of the First District *Buchanan, J.*

F. B. Conrad and Roselius, for the plaintiff.

Grymes, for the appellant.

MORPHY, J. This action was instituted by the syndic of the creditors of Cornelius Hurst, to annul certain sales of real property and slaves, made by the insolvent to his brother John S. Hurst, the present defendant. The plaintiff represents that, on or about the 22d of May, 1830, Cornelius Hurst with the view of availing himself of the benefit of the insolvent laws, fraudulently combined with John S. Hurst to cover and keep from his creditors the most valuable part of his property ; that to carry their design into execution, the said Cornelius Hurst made a fraudulent, simulated and sham deed of sale to his said brother, of fourteen squares and twenty lots of ground in the town of Hurstville, parish of Jefferson, and of a number of slaves; that the property thus fraudulently covered, constitutes nearly all the property of said Hurst of any real value ; that no price or consideration was ever paid, or seriously agreed to be paid by the said John S. Hurst, who is poor, and never possessed any means to enable him to pay for said property, and who has no business or profession whereby he can expect to acquire adequate means

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to pay for the same, the said John S. Hurst being in the employment of the insolvent ; that the property thus pretended to have been transferred, has never been delivered, but has always remained in the uninterrupted possession of the insolvent, who has never ceased to exercise over it acts of ownership, and who is in fact the true owner of the same.

The petitioner further avers, that Hurst is, moreover, the real owner and proprietor of a large brick yard, with all the apparatus and implements thereunto belonging, in the fauxbourg Bouligny, which he has not surrendered to his creditors ; that in order to defraud them of this valuable property, the said Hurst suffered the same to be sold by the sheriff for a small debt, at which sale he became the purchaser of it, but caused the title to be made to his brother John S. Hurst, who covers this property so as to enable the insolvent to keep it out of the reach of the creditors ; that Cornelius Hurst paid out of his own funds whatever was paid for said property, and has continued in possession thereof, and exercised acts of ownership over it, in the same manner as he did before the sale, &c. The defendant denies the fraud and collusion charged in the petition, and alleges that he has a good and lawful title to the lands and slaves therein mentioned and described. The case was laid before a jury, who gave their verdict in favor of the plaintiff. From the judgment entered upon this verdict, the defendant appealed, after an ineffectual attempt to obtain a new trial.

This case has been submitted to our consideration without argument. No points have been filed in this court, nor is there in the record any bill of exceptions, calling for the expression of our opinion on any question of law. The simulation and fraud alleged against the sales made to the defendant, are matters of fact which were peculiarly within the province of the jury. We have risen from a close examination of the evidence with the impression that it sustains the verdict of the jury, and does not make it our duty to disturb it,

Judgment affirmed.

JOSHUA STAPLES v. URSIN BOULIGNY.

One who claims to be the owner of property seized and in the hands of an officer of the court, must apply, by opposition as a third person, to the court from which the order of seizure was issued, directing his proceedings against the party at whose suit the seizure was made, and not against the sheriff, who is a mere stake-holder. C. P. 397, 398.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Peyton* and *I. W. Smith*, for the appellant.
Roselius, for the defendant.

MARTIN, J. The defendant, sued for the delivery, or the value of two slaves in his possession, urged as an exception to the plaintiff's action, that the slaves were committed to his custody as sheriff of the Criminal Court of the First District, and were seized by him in his said capacity on a writ of *fi. fa.*, issued by that court in the suit of *The State v William H. Williams*.

The exception was sustained, the court being of opinion that, from the petition and the document annexed thereto, it is shown that the slaves are in the custody of the defendant in his official capacity, and were so at the time the plaintiff purchased them; that they are also in his custody under a writ of *fi. fa.* at the suit of the State; and that the plaintiff ought to have proceeded by an opposition to the sale under the *fi. fa.*, before a competent tribunal, contradictorily with the plaintiff in the *fi. fa.*, instead of proceeding against the sheriff, who is without capacity to discuss the opposition, or defend the rights of the seizing creditor. The plaintiff appealed.

By the act of 1805 (B. and C.'s Digest, p. 269, sec. 39), the lands, tenements, goods and chattels of persons convicted of any crime, are, from the time of their commitment, bound for the expenses incurred in their prosecution and conviction. The record shows that the slaves were committed as part of a gang introduced into this State contrary to law by William H. Williams, who was prosecuted and convicted, and are in the defendant's possession under a seizure on a *fi. fa.* issued on the judgment pronounced on the indictment of Williams.

The plaintiff claimed them under a sale from the latter, of

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the 21st of May, 1841, at which time they were already in the custody of the defendant, a circumstance which is stated in the bill of sale. The record of the prosecution of Williams shows that the true bill was found on the 17th of February, 1841, the verdict on the 1st of May, 1841, and the judgment rendered on the 24th of July, 1841. The sale made between the conviction and the judgment, evidently shows an intention of evading the law. It appears to us that the court did not err, but correctly concluded that, according to articles 397 and 398 of the Code of Practice, a party who claims the ownership of property seized, is bound to apply, by third opposition, to the court from which the order of seizure was issued, and to direct his claim against the party at whose suit the seizure was made, and not against the sheriff, who is a mere stake-holder.

The first judge properly withheld from the plaintiff his assistance in a suit against the sheriff, when the Code of Practice pointed out the mode by which he might obtain justice.

Judgment affirmed.

WILLIAM LAURANS v. LUBIN GARNIER.

No judgment can be rendered in an action against a vendor alone, on a prayer "that the plaintiff be put in possession by an undisputed title," where third persons, holding adversely, are not before the court.

It is only where an entire failure or want of title on the part of the vendor is shown, that a purchaser is entitled to recover the price paid, without eviction, and without any previous proceedings, jointly with the vendor, to obtain possession.

The vendee of a tract of land cannot maintain an action against his vendor for delivery of the property, where there was no agreement as to a delivery at a particular time, and the petition does not aver that the latter was put in *mora*. C. C. 2461. The law considers the delivery of an immoveable as always accompanying the public act which transfers the property. C. C. 2455.

APPEAL from the District Court of the First District, *Buchanan, J.*

H. R. Denis and Preston, for the appellant. This is the *actio ex empto* of the Roman law. Dig. lib. 19, tit. 1, law 3, § 1; law 11, § 5, 13; law 13, § 21. Pothier, Vente, part 2, ch. 1, art. 5, nos. 61—74. *Buford v. Valentine*, 3 Mart. N. S. 71. This is not a

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suit to annul a contract, but to enforce it; consequently, the prescription of five years, under art. 3507 of the Civil Code, is inapplicable.

The deed is *prima facie* evidence of the delivery of the immoveable sold, only when the vendor is in possession. 11 Mart. 641. 1 Ib. N.S. 179. 3 La. 179. When the vendor is not in possession, he must redeem and deliver the thing sold, and the costs of delivery are to be borne by him. Civ. Code, arts. 2458, 2459.

L. Janin, for the defendant.

BULLARD, J. The plaintiff alleges that he purchased, in 1836, from the defendant, Lubin Garnier, a tract of land containing fifteen hundred *arpents*, situated in the parish of East Baton Rouge, for the price of nine thousand dollars, which has been paid. That he has faithfully complied with his obligations as vendee, but that his vendor has not fulfilled his obligations, and that he has never delivered the said property to the petitioner, and put him in peaceable possession, but, though demanded, refuses and neglects so to do. He represents that it is impossible for the vendor to put him thus in possession, and in the actual enjoyment of said property, inasmuch as said land, or a great part of it, is occupied and cultivated by several persons, who are in actual possession, and have been so for more than twenty years, and hold by titles from the United States. He sets forth the names of the adverse claimants in possession. He alleges that he has demanded from them his land, by virtue of his title, but that they refuse to deliver up the same, maintaining that their title is better than that of the petitioner. He further alleges, that the defendant well knew, at the time he sold the land, that there were adverse titles, and that the claimants were in possession, of which fact the plaintiff says he was ignorant, and that he would not have purchased had he known of any adverse title or possession. That for this failure on the part of his vendor to deliver the land sold, and because a better title than his was in other persons, the petitioner is entitled to have the sale to him cancelled, and the money paid by him restored, with interest and damages. He concludes by praying that the defendant may be condemned to put the peti-

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tioner in possession of the land sold within a delay to be fixed by the court, with an undisputed title to the same, or, in default thereof, that the sale be cancelled, and the defendant condemned to refund the price, with interest and costs.

The defendant answers that, reserving all exceptions to the form of proceedings in the case, he admits the sale of the land to the plaintiff, but denies that the land was settled upon at the time; he avers that the plaintiff, prior and subsequent to the sale, examined and travelled over the land, and expressed himself satisfied; that he never made any difficulty as to the title; and that the defendant's title is clear and unincumbered. He further avers, that no persons are settled on the land, and if they are, that they have no title, nor were any settled on it at the time of the sale. He claims damages in reconvention for this vexatious suit. There is also a plea of prescription.

The court below regarding the action as one of rescision, sustained the plea of prescription of five years, which had elapsed from the date of the sale, March 28, 1836, until the institution of this suit, September 7, 1842, and the plaintiff appealed.

His counsel contends that the court erred in regarding this as an action of rescision or nullity, which is prescribed by five years, according to article 3507 of the Civil Code. That it is, on the contrary, the *actio ex empto*, the plaintiff claiming the execution of the contract, and, in default thereof, the restitution of the price.

The record discloses several matters which render this action quite novel in our courts. 1. Bouligny, the defendant's vendor, is shown to have had a title emanating originally from the Spanish government, and which appears to have been confirmed by the act of Congress of 1822. 2. The plaintiff never made any attempt to take actual possession, although it is shown that the whole tract is not possessed under adverse titles, and he never took any legal steps against those who are in possession of a part, making his vendor a party in warranty. 3. Those persons whose titles are alleged to be better than that of Bouligny, are not before us; and their titles, so far as shown, emanated from the American government, and, consequently, are of a date subsequent to that owned by the plaintiff. 4. If those persons

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in possession under their American titles, should be declared to have the better title, it must be in consequence of their possession; and the court must necessarily look at the condition of things at the date of the sale by Garnier to the plaintiff, in 1836, because, at that time, the plaintiff might have instituted suit, and thus stopped the prescription which was running in favor of the possessors. This neglect to do so, cannot prejudice the defendant, as warrantor.

Thus we are, in substance and effect, called upon to say, whether in March, 1836, there was a better outstanding title in Thomas and others under their certificates, coupled with possession, than that of Bouigny, founded on an order of survey in 1797, an actual survey in 1808, by Pintado, while that part of the State was in *de facto* under the government of Spain, and a relinquishment of title on the part of the United States, in 1822. Such a question would necessarily involve an inquiry into the character of the adverse possession, and the time at which it commenced, and whether the claimants knew of the title of Bouigny; and this, not only without making them parties, but partly upon their testimony as witnesses in the cause. The case is, therefore, as was said by the district judge, the inverse of a petitory action. It is manifestly impossible for the court to render the judgment prayed for as the first alternative, to wit, that the plaintiff be put in possession by an *undisputed title*, because those who hold adversely are not before us, and we cannot pronounce upon their titles, so far as to order the plaintiff to be put in possession of any land occupied by them. With respect to the second alternative, that of annulling the sale and decreeing the defendant to restore the price, he asks us, in substance, to give effect to the warranty of the vendor without any eviction, and without any effort made by him to make good his title by suing the adverse possessors and making his vendor a party.

That there are cases in which the purchaser would be entitled to recover back the price paid, without eviction, and without any previous proceedings concurrently with the vendor, to put himself in possession, we readily admit, but it is only when there is an entire failure, or want of title shown on the

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part of the vendor. Of that character is the case of *Buford v. Valentine* (3 Mart. N. S. 57), in which it appeared that the vendor had no title out of the domain. In another recent case, that of *Pepper et al. v. Dunlap*, 9 Rob. 283, we gave relief to the purchaser on his showing that the claim of his vendor to the land had been rejected by the Land Commissioners, and that the land belonged to the domain, and had since the sale been patented to other persons by the government. The case now before us is entirely different, inasmuch as the vendor is shown not only to have a title, but apparently an older one than those of the adverse occupants.

If the plaintiff had not paid the price, and he were now resisting a suit to recover it, the utmost relief which he could expect under the law, would be security on the part of his vendor to make good his title.

But it is contended that this is an action to compel the delivery of the land sold, which is one of the primary obligations of the vendor.

The Code declares that "the law considers the tradition, or delivery of immovables, as always accompanying the public act which transfers the property. Every obstacle which the seller afterwards imposes to prevent the corporeal possession of the buyer, is considered as a trespass." Art. 2455.

If the seller fails to make the delivery at the *time agreed on* between the parties, the buyer will be at liberty to demand either a cancelling of the sale, or his being put in possession, if the delay is occasioned only by the act of the seller (art. 2461); and this is the article, upon which the counsel say they rely, in their written brief.

Now, in this case, there was no agreement as to a delivery at a particular time, nor averment of a putting *in mora*. On the contrary, as a part of the land was not possessed adversely, there is no ground for taking this out of the rule, that the tradition accompanies the public act; and the buyer could at once have sued the adverse possessors of a part of the same tract, making his vendor a party in warranty. After acknowledging in the act of sale that he was well acquainted with the land, he suffers six years to elapse without taking any steps ei-

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ther against the occupants of a part of the land, or his own vendor and warrantor. We conclude he is not entitled to recover in this action.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, reserving, however, to the plaintiff his recourse in warranty against the defendant.

J. BAPTISTE DOUGART v. LOUIS DESANGLE.

Plaintiff having instituted an action for arrears of rent against *L— & Co.*, citation was served only on one of the parties composing the firm, which was not alleged to have been a commercial one. *Held*, that the action could not be maintained against one of the members alone, as in every suit on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are presumed to have done so (C. C. 2080); that the action being against a partnership, it must be inferred that there are several defendants; that it is enough to show that all the defendants named in the petition were not cited, to entitle those cited to require a dismissal of the action; that the omission to join the proper parties, is not a matter of form, but a matter of law on which the rights of the parties depend; and that the plaintiff could not amend his petition, by substituting the name of the party cited for that of the firm, and proceed with his action.

A misnomer of the defendants in the petition and affidavit, will be cured by the execution of a bond for the release of the property provisionally seized, by the defendants in their real names.

APPEAL from the City Court of Lafayette, *Carregan, J.*

SIMON, J. The defendant is appellant from a judgment which condemns him to pay to the plaintiff the sum of \$524, which is the balance due for the rent of a house for two years, at the rate of \$25 per month, credit being given in the plaintiff's petition and affidavit, for three months' rent, paid previously to the institution^r of the suit.

The present action was instituted on the 22d of January, 1844, under the allegations of the petition, that *Louis & Co. are justly indebted* to the petitioner in the sum of \$524, as specified and set forth in the affidavit annexed; and it is stated in the said affidavit, that "*Loison & Co. rented from him, the plaintiff, a house for two years, commencing on the 1st day of November,*

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1843, and to run for two years, *at twenty-five dollars per month*; that *three months' rent have been paid*, and the balance of the sum for said lease will be and is five hundred and twenty-four dollars, said rent payable monthly; your affiant has good reasons to believe, and does believe that the furniture and property on which he has a lien and privilege, will be removed out of the premises, and that he will and may be thereby deprived of his lien." He prays that *they* may be condemned to pay, &c.

A provisional seizure had been previously issued on the 20th of January as against *Loison & Co.*, by virtue of which the city marshal had, on the same day, seized various articles of furniture and other things; and, on the 4th of March ensuing, the defendant filed his answer, in which he sets up, that "*he never has been a member of any kind of copartnership of Loison & Co., if any such partnership ever existed*; and he further says, *that he is not indebted in any way or manner to said plaintiff; that no contract of lease of any kind has ever been entered into between him and the plaintiff.*" On the reading of this answer, the plaintiff's counsel moved to have leave to amend his petition, by inserting the name of *Louis Desangle* in place of *Loison & Co.*, on the ground that said Desangle had come into court and filed his answer to the citation. This was objected to by Desangle's counsel, on the ground that no suit had been legally instituted against his client; but the lower judge, having sustained the plaintiff's motion, and ordered the parties to proceed to trial immediately, the defendant's counsel took a bill of exceptions.

We think, notwithstanding the appellant's answer, which is virtually nothing more than a plea that the defendant, upon whom a citation had been served, was not, and could not be considered as the proper party to the suit, that the present action, instituted against *Loison & Co.*, could not be maintained below against *Louis Desangle* alone, and that the judge *a quo* should have dismissed it. If the plea had been that of a mere misnomer, there is no doubt that the plaintiff would have been entitled to amend his petition by inserting the right name, after its having been disclosed by the defendant; but it was a denial of his being a member of the partnership of *Loison & Co.*, and of his ever having entered into any contract of lease with the

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plaintiff. The suit brought against a partnership, not alleged to be commercial, necessarily implied that there were several defendants against whom the original proceedings were instituted, and Louis Desangle, if one of them, had clearly a right of appearing before the inferior court, and requiring his co-partners to be made parties to the suit. Instead of doing so, however, he denied his being one of the partners of the firm of Loison & Co., and, without any proof that he was properly sued as such, the trial was gone into immediately against him alone, and, in the absence of the other parties, who, from the prayer of the petitioner, had been sued as being jointly obligated with him. This was irregular and illegal; as the record informs us that, although the original proceedings were commenced against the three members of a partnership called in the petition *Loison & Co.*, only one of them was brought before the court by citation, the two others not having been cited.

It appears that a writ of provisional seizure having been issued against *Loison & Co.*, two days before the filing of the plaintiff's petition, the same was levied upon certain goods and articles of furniture, &c., belonging to *Lasuse & Co.*; whereupon, the members of this partnership, composed of *Lasuse*, *Dominique Clavele*, and *Louis Desangle*, gave their bond to the marshall, in the sum of \$300, with Henry Hart as security, for the forthcoming of the articles seized, *in case the above named principals were cast in the suit now pending in the City Court of the city of Lafayette, entitled Bapte. Dougart v. Lasuse & Co.*, which bond was signed respectively by the three defendants. Only one of them was subsequently cited to appear, although the suit, in its inception, was intended to be against the three, and although the petition prays that they may be condemned, &c.; and it is perfectly clear that it could not be maintained against the appellant alone, as it is a well settled rule that, "in every suit on a joint contract, all the obligors must be made defendants, and that no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so." Civil Code, art. 2080. 3 La. 437. In the 5 La. 122, this court held that, as the general rule is, that all the co-debtors must be sued, it is sufficient for the defendants to show that all named in the

petition) are not made parties ; and in the case of *Loussade v. Hartman et al.*, 16 La. 117, in which the four obligors were also named in the petition, it was decided that the judgment was erroneous, because, being a joint one, it was against two of the defendants only. Here, as we have already remarked, the first proceedings were instituted against *three* defendants, under the name of Loison & Co., though the real name of the partnership was Lasuse & Co. This informality was cured, it is true, by the defendants' giving their bond in their true names ; but the plaintiff could not subsequently proceed against any one of them alone. It was his duty to make them all parties to the suit, and, having failed to do so, his action must be dismissed.

It has been contended, however, by the appellee's counsel, that a provisional seizure having been issued, the appellant claimed the property, and was, therefore, bound to defend the suit in the name by which he claimed it ; and that if there were any irregularity, there is an express provision of law that says, "that no judgment or decree shall be reversed for any defect or want of form, but the Supreme Court shall proceed and give judgment according as the rights of the case and matter of law shall appear unto them, without regarding any imperfections, or want of form in the process, or course of proceeding whatsoever." B. and C's. Digest, p. 177, No. 3. That this law of 1813 is yet in force, is very questionable, as having been superseded by the Code of Practice and its amendments, which contain all the rules of proceeding by which we are governed, it has perhaps been repealed by the law of 1828, B. and C's. Digest, p. 155, No. 17. But here, the non-joinder of parties is not a mere informality, or want of form. It is matter of law upon which the rights of the parties depend, and which is the legal foundation of the action ; and our judgment must, therefore, be rendered accordingly. As to the provisional seizure of property said to have been claimed by the appellant, this is incorrect. We have already shown that the property seized was claimed by the three partners of Lasuse & Co., who gave their joint bond or obligation for its forthcoming, and that the appellant is one of them. It is obvious, therefore, that he only claims it as one of the partners.

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It is, therefore, ordered and decreed, that the judgment of the City Court be annulled and reversed, and that ours be for the defendant, as in case of non-suit, with the costs in both courts.

A. B. BARRETT v. HENRY P. SALTER and others, Owners &c. of the ship Huron.

Where the master receipts for articles to be shipped on his vessel, as in good order, the vessel will be responsible for any damage subsequently discovered, unless clearly proved to have occurred before the delivery. And where he gives a receipt for goods left on the levée, they are as much at the risk of the ship, as if actually on board.

Where the goods left on the levée to be shipped, are exposed to rain, and the shipper subsequently proposes to the master to ascertain the damage from the exposure, before the voyage, and the latter declines to do so, the vessel will be responsible for any increase of damage, resulting from the voyage, and the delay to which the goods are necessarily exposed in the foreign port before they could be examined.

APPEAL from the Commercial Court of New Orleans, *Watts, J. C. M. Jones*, for the plaintiff.

Jewett, for the appellants,

MORPHY, J. This action is brought to recover of the captain and owners of the ship Huron, \$1,409 46, for loss and damage sustained on forty hogsheads of tobacco, delivered on board of said ship in July 1842, and consigned to John Gilliat & Co., of London. The petitioner alleges that at the time of the delivery and receipt of the tobacco, it was sound and in good order, but that through the culpable negligence, carelessness and inattention of the captain, the forty hogsheads of tobacco, after being received by the ship, were suffered to lie out on the levée exposed to a violent storm of rain, by which they were damaged to the amount above stated, for which the defendants are responsible, as they contracted to deliver this tobacco in London, in the same order in which they received it. The defendants denied their indebtedness, and pleaded the general issue. There was a judgment below against them, from which they have appealed.

The evidence shows that on the 29th and 30th of July 1842, **Bowe & Crenshaw**, the plaintiff's agent in New Orleans, ship-

ped forty hogsheads of strip tobacco on board the ship Huron, consigned to the house of Gilliat & Co. of London. Two of the clerks of the shippers, testify that on both days the weather was good at the time the tobacco was sent to the ship, and that it was receipted for by the mate as being in good order and condition; that a few hours after it had been received on the first day, a heavy rain came on, which lasted about two hours, to which the tobacco was suffered by Captain Paine to remain exposed; that when the rain was over, the witnesses were directed by Bowe & Crenshaw, to see whether any of their tobacco had been left out in the rain, and, if so, to take the marks and numbers of such of the hogsheads as had been so exposed. That they found the tobacco on the levée without any covering; that in the absence of the captain, they expostulated with the mate on the exposure of the tobacco during the rain, and on the probable injury it would sustain, if stowed away in its wet condition; that the mate answered that, he thought the casks sufficiently tight not to admit the rain, and that there could be no risk in taking the tobacco on board, and proceeding to sea. On the following day, after some tobacco had been sent to the ship, a heavy rain fell at about twelve o'clock, after which the witnesses were again sent to the vessel, and found the tobacco wet and exposed as on the preceding day. Robinson, one of these clerks, testifies, that he then went on board of the Huron, and found Captain Paine sick in his bed. That he complained to him that the tobacco sent to the ship on that day, and the day before had not received the usual care and attention at his hands; that on both days it had been left exposed to heavy rains, and if placed on board without being opened and trimmed, the tobacco, upon its arrival in London, would be found to much damaged; that if such was the case, the ship would be held responsible, as the shippers had provided themselves with the particular marks and numbers of the hogsheads, and would report them to the London house. Captain Paine answered, it would be hard to hold the ship responsible, as he was sick, and had to trust the management of every thing to the mate; and that had he been well, the matter would have been better attended to. This witness testifies farther, that he proposed to Captain Paine, as the

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only means of avoiding a heavy loss in London, to have the hogsheads opened, and should it appear that the rain had penetrated, to have the wet tobacco trimmed off; that Bowe & Crenshaw would consent to such a course on his paying expenses of such opening, and the damage which should prove to have then occurred, but, that Captain Paine declined to accept the proposition, adding that he did not expect that the tobacco could have been injured as the casks were good and tight. The mate, whose testimony was taken under a commission, says, that, on the 30th of July, 1842, twenty-eight hogsheads of tobacco were exposed to the rain on the levée; that during the heaviest part of the shower, it was not covered with canvass, but that, as soon as the rain abated, so that he could induce his men to work, he had the hogsheads rolled together and covered with sails. That he had sent word to Bowe & Crenshaw, on the coming of the rain, to send no more tobacco at that time; that he received no answer; but that they continued to send tobacco to the ship. In a written paper, annexed to the commission, this witness makes the additional and different statement, that he wrote on the back of a dray receipt a note to the shippers, requesting them not to send any more tobacco as there was a prospect of rain, and that they answered on another dray receipt, that the tobacco was on the levée, and might as well be exposed at the ship, as at the steamboat landing. This witness adds, that the tobacco arrived so fast on the 30th of July, that it was impossible to get it all on board before the rain, though all the men were diligently at work for the purpose; that some drays arrived with tobacco even after the rain had begun, but that he directed them to take shelter under the arch of the Orleans Cotton Press. Clear bills of lading were delivered to the shippers. The tobacco arrived in London in the beginning of October, but its turn to be examined at the Queen's Warehouse came on only in December following. It was found to be very much injured by rain water, and it became necessary to cut off several thousand pounds of it. From the certificate of the keeper of the Queen's Tobacco Warehouse in the London Docks, and his testimony, and that of other witnesses, taken under a commission, the damage and

loss are shown to amount to the sum of £317 2s 10d, equal to \$1,409 46. Under the evidence, it does not appear to us that the judge below erred in the conclusion to which he came. If with all due exertion the tobacco could not have been rolled on board before the rain, the ordinary precaution of covering it with tarpaulins or sails, might, and should have been taken to protect it from the coming shower, of which there must have been previous indications. If, as is stated by the mate, in opposition to the clerks of Bowe & Crenshaw, a part of the tobacco was brought during the rain, or against his notice not to send any more, he was not bound to receive it at that time; yet from the moment he receipted for the tobacco as being in good order, the ship became responsible for any damage to it subsequently discovered, unless clearly proved to have occurred before the delivery. In *Fisher et al. v. Brig Norval et al.*, 8 Mart. N. S. p. 120, this court held, that if the master gives a receipt for goods left on the levée, they are as much at the risk of the ship as if actually put on board. Had Captain Paine accepted the proposition to ascertain and repair the damage at New Orleans, the amount of the loss would have been comparatively small. In declining this offer, he took upon himself the risk of the increase of the damage during a long voyage, and the delay which he must have known would occur before the tobacco could be examined in London. It is further shown, that upon the captain's return to the latter place on a subsequent voyage, he offered one hundred and forty pounds to settle the claim of the plaintiff; this offer, the receipts of the mate, the clear bills of lading afterwards given, and the whole evidence in the case appear to establish fully the liability of the defendants.

Judgment affirmed.

Hanna v. Bartlette and another.

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JOHN H. HANNA v. THERON A. BARTLETTE and another.

An appeal will lie from a judgment on a reconventional demand, where the amount claimed in reconvention is sufficient to give jurisdiction to the Supreme Court, though the original demand, being under three hundred dollars, no appeal could be taken from the judgment on it. In such a case, the judgment on the demand in reconvention will alone be examined on the appeal.

APPEAL from the District Court of the First District, *Buchanan*, J. This was an action on a protested bill of exchange, for \$150, date 15 April, 1843, drawn by one G. Campbell, and accepted by T. A. Bartlette. The latter answered that he had accepted the bill sued on, with another of the same date and amount, payable on the 1st, of October, 1844, but that he received no consideration therefor; that the consideration for which they were given, was an illegal and immoral one, as between the plaintiff and the drawer, to wit, the hire of a slave as a concubine for the latter; that plaintiff agreed to allow the slave to live with Campbell, for two years, for the sum of \$300; and that he, Bartlette, was induced to sign a contract, reciting that he had hired the slave for two years, and to accept the bills, on the representations of Campbell and the plaintiff, that the girl was an industrious servant, and would earn the amount of her hire, which Campbell would hand to him, to pay over to the plaintiff. He prays that the contract for the hire of the slave may be recinded, and the acceptances of the two bills cancelled.

A witness named, Leach, introduced by the defendant, Bartlett, testified, that the plaintiff had offered to sell him the slave, telling him, at the time, that she had been living for several years with Campbell. He deposed that she still continued with the latter. The contract between Bartlette and the plaintiff was offered in evidence. There was a judgment below in the favor of the plaintiff. Bartlette appealed.

R. H. Chinn, for the plaintiff.

Bartlette, pro se.

MARTIN, J. The defendants are sued as drawer and acceptor of a bill of exchange, for one hundred and fifty dollars. Judgment by default was taken. It was set aside as to the ac-

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ceptor Bartlette, on his answer. He urged that the acceptance he was sued on, and that another bill of the same amount, now in the hands of the plaintiff, but not yet payable, were given without any value received, but on a contract *contra bonos mores*, to wit, the hire by the plaintiff to the drawer, of a female slave, intended by both parties to live in concubinage with the latter. He, therefore, opposed the recovery on the acceptance sued upon, and in reconvention demanded the rescission of the immoral contract upon which the bills were drawn and accepted.

The plaintiff had judgment on his petition, and on the plea of reconvention. The defendant Bartlette took a suspensive appeal, and gave a bond for \$250. In the case of *Caffin v. Pollard*, 3 Robinson 124, we held, that when the original demand was under three hundred dollars, and the demand in reconvention above, the judgment on the latter was alone to be considered by us, as we were without jurisdiction in regard to the original demand; accordingly, we do not view the appeal in the present case as one legitimately before us, with regard to the judgment for one hundred and fifty dollars, for the plaintiff might have taken his execution thereon.

By the reconvention, the defendant Bartlette claimed the rescission of a contract under which his acceptances for \$300 had been obtained, and he has become liable for the costs of protest and notice, which raises the amount in dispute, to a sum, which entitles him to a resort to us for relief.

It appears that the first judge did not err, for the evidence is far from supporting Bartlette's allegations of the immorality of the contract. The contract is a written one, and there is nothing in it which has the least allusion to the object, which the defendant pretends it was intended for. He has endeavored to eke out his case by the introduction of a witness, whose evidence does not support it.

Judgment affirmed.

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HENRY BRODE v. THE FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

Plaintiff having recovered a judgment against the Firemen's Insurance Company of New Orleans, propounded interrogatories to a stockholder, cited as a garnishee, who answered that he had owned certain shares in the company, but had forfeited them under the third section of the charter, before being made garnishee, by failing to pay the balance due on the shares subscribed for by him. He admitted that he had not sold or otherwise disposed of the shares, and had paid but a certain portion of the price of each: *Held*, that the liability of the garnishee resulted from his answer; that the forfeiture of the shares of delinquent stockholders, provided for by the third section of the charter, was a means given to the company to enforce, for its own protection, the payment of the amount subscribed for; that, without the action of the company, the stockholders do not lose their property in their respective shares; that the creditors of the company are entitled to the whole stock for the security of any judgment obtained against the company and that the company could not by any act of theirs, to the prejudice of their creditors, liberate any of its stockholders from their obligations to pay the full price of the shares subscribed for by them.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* Chittenden, a stockholder in the Firemen's Insurance Company of New Orleans, having been cited as a garnishee by the plaintiff, who had obtained a judgment against the company, in answer to interrogatories propounded to him, admitted that he owned, in 1839, 16 shares of the stock; but averred that he had forfeited the same, under the third section of the charter, long before the service of the interrogatories on him. He stated further, that he had never sold, nor otherwise disposed of the said shares, and that he had paid but \$26 or \$27 per share. The plaintiff thereupon took a rule on the garnishee, to show cause why judgment should not be rendered against him, for the amount of the balance due on his shares. The sheriff returned, that the rule could not be served on the garnishee, in consequence of his absence from the State. There was a judgment against him, and he appealed.

The 3d section of the charter of the company (Act of 10 March, 1838), declares: "That the subscribers of the said company, shall pay, at the time of subscribing, five per cent upon each share, and five per cent every sixty days thereafter, until fifty per cent of the capital stock shall be paid in; *provided*, that if

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the fifty per cent so paid, should be by losses reduced, then the president and directors shall call in such other instalments, so as that the said company shall always have in possession at least forty per cent of its capital; thirty days previous notice being given of such call in two papers, in English and French; and any stockholder failing to pay any such instalment so called for, shall forfeit to said corporation all previous payments which he may have made, and cease to be a stockholder therein."

Lowndes, for the plaintiff. The third section of the charter of the company prescribes the mode in which the payments of the subscriptions to the capital shall be made; and it is also declared by the same section, "that the company shall always have in its possession at least 40 per cent of its capital:" and by section 8, rule 5, it is provided, "that the stockholders shall not be responsible for losses beyond the amount of their respective shares."

What is the true construction of this fifth rule of the 8th section of the charter? It is plainly this, that, to the extent of their subscriptions, the stockholders shall be liable for the debts of the company.

It was competent for the directors to have compelled the payment of the subscriptions by a suit; but, as they have neglected to do so, the plaintiff ought not to be precluded from exercising the same right. *Cucullu v. Union Insurance Co.*, 2 Rob. 571. *Shiff v. Union Insurance Co.*, 2 Rob. 579. *Brode v. Firemen's Ins. Co.*, 8 Rob. *Spear v. Crawford*, 14 Wend. 20.

As a stockholder, who had not paid the amount due on the stock held by him, the appellant was a debtor of the defendants, within the meaning of the act of the legislature of 20th March, 1839, and was properly made a garnishee.

His answers show a balance due on the sixteen shares of stock held by him, of 22 1-2 dollars per share, making the sum of \$360, for which judgment was rendered against him.

The charter requires the company to have always on hand at least 40 per cent of its capital: they may have more. The first 50 per cent on each share was to be paid in by instalments; the last 50 per cent, whenever the exigencies of the company demanded it. Suppose the amount paid in to have been ab-

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sorbed, and that losses required the immediate payment of the balance; the company had clearly a right to call that balance in at one time, on giving notice. So long as the company continued its operations, certain formalities, as between it and the stockholders, were to be complied with; but the stockholders were in fact *indebted* to the company from the day of subscription, to the extent of \$50 on each share. The time and mode of payment are indicated in the charter. If, however, the company declined acting, as in truth it has done, and refused to call in the balance due, are the creditors to suffer?

There is no rule of law which obliges them, in such a case, to call in the balance by instalments: they stand in the place of the company only with reference to the amount actually due; and when the company becomes insolvent (a fact shown by the return of the *fi. fa.*), if it fails to call in a sufficient sum to pay its debts, its creditors may do so.

The balance due on each share is, in fact, a debt due to the company, payable on demand, which its creditors can garnishee. If A. give his note to B., payable on demand, B.'s creditor may garnishee it; and service of citation and interrogatories upon A. would be held a sufficient demand; for if A. could delay payment until B. should call on him for payment, it would be equivalent to never paying the debt.

Nor are the creditors bound to call upon each of the stockholders for his *pro rata*: this would be to require a hard and almost impracticable duty.

With respect to third persons, the stockholders are sureties for each other, to the amount due by them respectively. There is no law which requires the creditor to sue all the sureties; but if one surety pay the debt, he may call on his co-sureties for their proportion.

Greiner, for the appellant. The judgment should be reversed. The case was tried on a rule, and the return of the sheriff shows that the rule was never served on the defendant. An attorney should have been appointed to defend him. C. P. 116.

MARTIN, J. Judgment having been obtained against the company, the plaintiff sought a partial execution of it, by summoning Chittenden, one of the stockholders, as a garnishee,

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who answered that he did not consider himself as a stockholder. He admitted that he had become the owner of sixteen shares of the stock of the company, but averred that he had forfeited them before he was made a garnishee: he stated, that he had not sold any of those shares, nor had they been disposed of in any other manner than by the forfeiture; that he paid on each of the shares about twenty-six or twenty-seven dollars. On this, the plaintiff took a rule on the garnishee, to show cause why judgment should not be given against him; this rule was not served, the garnishee having gone out of the State. On the day stated in the rule, judgment was taken against him. The record shows that he was duly notified; and he appealed.

In this court, the parties have admitted that no testimony was introduced, and that all the evidence is on file. The counsel for the appellant has urged, that the part of the record which states that the garnishee had due notice of the rule, ought to be rejected, as no part of the evidence states the notice. On this he has contended that the rule was improperly tried, and that the garnishee ought to have had judgment on the merits.

The appellee's counsel has replied, that when the indebtedness of the garnishee appears in his answer, judgment may be given against him without any rule, and he has contended that this is the case in the present suit.

The answer admits that the garnishee was a stockholder for sixteen shares; that he paid twenty-six or twenty-seven dollars on each; and that they have been forfeited, according to the third section of the charter of the company, *id est*, by his omission to pay the twenty-two or twenty-three dollars, the payment of which was protracted.

It appears to us that the learned judge did not err, in considering that the indebtedness of the garnishee resulted from his answer. We are referred to the charter. The price of each share is fifty dollars: the garnishee paid twenty-six or twenty-seven. The charter, as a means of compelling the punctual payment of the protracted part of the price, declares the forfeiture of the shares. This is a means which the law gives to the company to protect itself, when the insolvency of the de-

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faulting stockholders, or the great profits made by the company, make it their interest to sue for the forfeiture. The stockholder does not lose his property in the shares without the action of the company. A forfeiture is essentially a loss of one party, and a gain of the other. No one can acquire a right which he does not seek. *Invito beneficium non datur*. The creditors of a company have its whole stock for the security of any judgment against them; and the company cannot, by any act of theirs, liberate any of its stockholders from their obligation to complete the payment of the price of their shares, to the prejudice of the creditors. *Cucullu et al. v. Union Insurance Company*, 2 Rob. 571—578. The garnishee does not allege that the company has claimed the forfeiture; he is, therefore, still their debtor; and if he was to allege and prove it, the case just cited, perhaps, shows that he would still be bound to the plaintiff.

Judgment affirmed.

JULES LACAZE v. REVGES LOUIS SEJOUR.

An insolvent, who had placed on his *bilan* a debt due by him to the plaintiff, will, on the execution of a release to him by the defendant, be a competent witness for the latter, in an action by the plaintiff against him as a dormant partner, to prove that no contract of partnership existed. *Per Curiam*: By the surrender and release the witness became entirely disinterested.

In an action by the creditor of an insolvent, against a third person as a secret partner of the debtor, the defendant may, on the cross-examination of a witness of the plaintiff's, require him to state any declarations of the insolvent, as to the supposed connection of the latter as a partner with the defendant, made previous to the insolvency. *Per Curiam*: The answer was part of the *res gestæ*, and made at a time not suspicious.

The liability of a secret or dormant partner, depending, upon the mere fact of partnership, his name not being announced, and no credit being given to him personally as a supposed member, it is not necessary, in case of his withdrawal, to give any notice thereof to the public.

APPEAL from the Commercial Court of New Orleans, *Watts, J. J. F. Pepin*, and *Benjamin*, for the appellant.
Canon, for the defendant.

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MORPHY, J. The petitioner seeks to recover of the defendant \$14,043 50, alleging that this sum was due to him on notes, and on an open account, by one Alphonse Fleury, who was doing business in the city of New Orleans, as a merchant, under the style of A. Fleury; that the said Fleury, having failed, and deposited his books in court, he, plaintiff, discovered that the defendant was a secret partner of said Fleury in his business, and that said partnership being a commercial one, the members thereof are bound, *in solido*, for the partners debts, of which this is one, &c. The defendant, after a general denial, set up various defences, and denied that he ever was a dormant partner, or a partner in any other form, of Alphonse Fleury, &c. The case was laid before a jury, whose verdict was in favor of the defendant. From the judgment pronounced upon this verdict, the plaintiff appealed, having failed in a motion to obtain a new trial.

The main issue placed before the jury, appears to have been *socius vel non*, but, as the answer presented various other grounds of defence, the judge, in his reasons for refusing a new trial, informs us that he requested the jury to state on what reasons they grounded their verdict, as it would aid the lower court, and this court, in the farther proceedings in the case; that on the return of the jury, he accordingly inquired of them the grounds of their verdict, when, their foreman answered, that there was not sufficient proof to satisfy them of the existence of a partnership between Fleury and the defendant. The judge being of the same opinion, no doubt, refused the trial prayed for.

Our attention has been drawn to an entry made on the first page of Fleury's Day-book, in 1835. It is in the hand writing of the defendant, who, it appears, kept Fleury's books for him, until he could procure a book-keeper. This entry, if taken alone, would, to be sure, establish that the parties had formed some sort of partnership, as it credits the defendant for a sum of \$600, as his portion of capital put into the partnership; but from other entries in the same book, and in other books of the insolvent, the account of defendant appears to have been kept like that of any other person doing business with Fleury, and

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the sum of \$600, appears to have been re-imbursed to the defendant, a circumstance inconsistent with the existence of a partnership between them. A great many witnesses were examined on both sides. Some of them stated, that they had heard it said, and believed that Fleury and the defendant were partners, Gruntz, one of them, adds that, in 1837, the defendant proposed to him to form a partnership with him and Fleury, and told him that he was a partner of the latter. A number of other witnesses testified that Fleury never had any partner; that, had any partnership existed between him and the defendant, they would have known it from their intimacy with the parties; and that these rumors of a partnership between them, began to be heard of only after the failure of Fleury, when the plaintiff spoke of suing Séjour, as a dormant partner. Louis Feraud stated, that he was intimately acquainted with Fleury's business; that the \$600, was only loaned to Fleury by the defendant, to assist him in the beginning; that it was paid back to Fleury, and that he was present at the settlement they made some time after. Alphonse Fleury, who was also examined as a witness, testified, that no partnership ever existed between him and the defendant; that he was intimate with Séjour, and was the godfather of one of his children; that Séjour lent him a sum of \$600, which he was to return little by little, and which he has since entirely paid to him. Bussy, one of the plaintiffs' witnesses, stated, on his cross-examination, that he became the clerk of Fleury, in 1837; that Fleury, did his business alone, and had no partner; that had Séjour been in partnership with him, witness would have known it; that Séjour occasionally bought goods from Fleury, and settled for them from time to time, and never made any inquiry into the situation of the affairs of the store. That, in 1837, when a partnership between Fleury and Gruntz was contemplated, and they were making an inventory of Fleury's stock in trade, witness asked Fleury, how he expected to arrange the partnership, when there was a credit on the books to Séjour as a partner; that Fleury answered, that Séjour was not a partner, but had only loaned him the money; that upon witness' remarking, that, by the books, Séjour appeared as a partner, Fleury said, it mattered not.

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A bill of exceptions was taken to the opinion of the judge, who decided that, on the defendant's executing a release to Fleury, the latter's testimony should be received. We do not think that the judge erred. The circumstance of Fleury's having failed, and placed on his *bilan*, the debts ought to be recovered in this suit, coupled with the release executed to him by the defendant, made him an entirely disinterested and competent witness; nor do we think that the judge erred in allowing Bussy, the plaintiff's witness, to state on his cross-examination, the answer made to him by Fleury, in 1837, when about taking an inventory of the store, in consequence of the contemplated partnership between Gruntz and Fleury. This answer was part of the *res gestæ*, and was made at an unsuspecting time. Phillips, on Evidence, 1 vol. p. 145, 206. It has not been shown that the defendant ever interfered in any manner in the affairs of Fleury, nor at any time received, or was to receive any portion of the profits he made in his trade, nor that he said or did any thing from which it could be inferred that he was Fleury's partner, except the declaration spoken of by Gruntz, which the jury do not appear to have believed, opposed as it was to the testimony of the notary who prepared the act of the projected partnership between Fleury and Gruntz. The notary deposes that neither of them mentioned to him, at the time, the name of defendant, as his being in any way connected with, or concerned in the partnership to be formed between them. The credibility of Gruntz, was moreover affected by his being a creditor of Fleury, and, as such, interested in the question involved in this suit. The only circumstance then, which gives countenance to the plaintiff's claim, is the entry discovered to have been made by the defendant, on the first page of the insolvents Day-book, in 1835; but this entry, when coupled with the other circumstances of this case, seems to show, at most, that there was at first a partnership formed, or contemplated between the parties. The idea appears afterwards to have been abandoned. The money advanced by the defendant, was refunded to him by Fleury, and the business carried on by the latter alone, and for his sole account. Of the withdrawal of the defendant from the partnership originally intended, it was unnecessary to give any notice

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to the public, as the liability of a dormant partner depends upon the mere fact of partnership, his name not being announced, and no credit being given to him personally, as a supposed member of the firm. *Gow on Partnership*, 251. The existence of the partnership was a question of fact, on which the finding of the jury, under the evidence adduced, is by no means so clearly erroneous as to make it our duty to disturb it, especially when the judge below has expressed his opinion of its correctness, by refusing a new trial.

Judgment affirmed.

FRANÇOIS PAUL CASIMIR v. ANTOINE BLANC, Testamentary Executor of Félicité D'Abat, deceased.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Train and Grandmont, for the appellant.

D. Seghers, for the defendant.

BULLARD, J. The question we are called upon to decide in this case is, whether the plaintiff be, as he alleges, the legitimate son of Jean Casimir and Ursule, *alias* Sulet, free persons of color. He is appellant from a judgment of the Court of Probates, repelling his pretensions as such.

He gave in evidence a certificate of baptism extracted from the registry of a church in St. Yago de Cuba, signed only by the curate, in which it is said that, on the 3d of May, 1805, he baptised an infant by the name of Francisco De Paula, who was born on the 2d of April previous, the *legitimate son* of Juan Pédro and Maria Ursula, colored persons, and natives of St. Domingo.

This document, without the signature of either the father, mother, or god-father and god-mother, or any witnesses, furnishes no proof against the father, except so far as it may be shown that a copy of it had been given by him to the present plaintiff. A copy, in effect, bearing no other date than the original, is shown to have been possessed by the plaintiff, but whether it was in his possession before the death of Jean Casi-

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mir, in 1827, is not distinctly shown. Although it may be fairly presumed that he obtained it from his father, yet as an admission emanating from him of the legitimacy of the plaintiff, it is balanced by the solemn declaration of Jean Casimir in his last will, that he had no legitimate child, and that he acknowledged no natural one; and that he disposed of his whole property in favor of his wife, Félicité D'Abat.

The fact which it is incumbent on the plaintiff to prove, either by direct or presumptive evidence, is the marriage of his father and mother. There is no positive evidence. The presumptions in support of the affirmative, are that they lived together in St. Domingo, and at St. Jago de Cuba, where the plaintiff was born; that the plaintiff lived with his father, who called him his son, after they came to New Orleans; that he was generally recognized as the son of Casimir; and his possession of the certificate of baptism.

The presumptions in support of the negative are, the absence of any record in the church at St. Jago de Cuba showing the marriage, where it is alleged to have been celebrated, although it is shown that the usage of that place was to make a record of marriages, together with the fact that Casimir never admitted his marriage to a witness, who was intimate with him at the time, and was living with his sister as his concubine; and especially the well established fact that Casimir was, during the lifetime of Ursule, legitimately married to Félicité D'Abat, in this city, and that Ursule made no complaint, although she lived in the same street, or at least in the same *faubourg*. We can hardly presume that he would have been guilty of bigamy. Certain it is that Ursule had not cohabited with Casimir for some years before her death, but was living in concubinage with one Jean, who appears to have accompanied them from St. Jago de Cuba.

This last circumstance strongly marks the case of *Taylor v. Swett*, upon which the plaintiff's counsel relies, and distinguished it from this. In that case the plaintiff's mother died in the possession and enjoyment of the condition or *status* of wife. In this she had been long separated from her alleged husband, made no complaint, and even lived in concubinage with another

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man, while her alleged husband was married to, and lived openly, in her presence, with another woman. 3 La. 33.

To these presumptions may be added another, to wit, that although at this time nearly forty years of age, and of age in 1827, the plaintiff made no attempt to set aside his father's will, by which he instituted his wife, Félicité D'Abat his universal legatee, and to claim his *légitime*. If he were now to attack that will as inofficious, he might, perhaps, be repelled by the plea of prescription, even if his legitimacy were not questioned. He certainly cannot succeed in this case, without fastening upon the memory of Jean Casimir the imputation of having been guilty of bigamy.

These presumptions in favor of and against the pretensions of the plaintiff, being fairly balanced, independently of the testimony of the witnesses, which is quite discordant and unsatisfactory, appear to us, as they did to our learned brother of the Court of Probates, to preponderate against him; and we concur in the conclusion, that he has failed to make out his case.

Judgment affirmed.

 FRANÇOIS v. JACINTO LOBRANO.

Though partial payments have been made to the master by a slave, for the purpose of purchasing his freedom, the latter remains the property of the master, who will continue to be entitled to all his services; and a purchaser, to whom he is afterwards sold, subject to the condition of being emancipated on his paying the supposed balance of his value, will be entitled to all his services until such balance is paid. *Per Curiam*: A slave cannot become partially free; nor can he, until legally and absolutely emancipated, own any property, without the consent of his master.

APPEAL from the District Court of the First District, *Buchanan, J.*

David, for the appellant.

Latour, for the defendant.

Castera and *Marsoudet*, for the warrantors.

MORPHY, J. The petitioner, formerly a slave of Louis Pilié, was sold by his master to Joseph Sauvinet, on the 23d of July,

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1835, for the sum of \$300, and on the express condition that as soon as he should have reimbursed to the purchaser the said sum of \$300, he should be entitled to his freedom, the formalities prescribed by law to be fulfilled at his (the petitioner's) expense. On the 25th of January, 1839, Sauvinet sold the petitioner to Joseph Saliba, for the same price, and on the same condition; and, on the 11th of October, 1838, Saliba sold him to the present defendant, for the same price and on the same condition. The petitioner sues his present master for his freedom, and for damages, alleging that, previous to July, 1835, he had paid Louis Pelié \$500, on account of his freedom, and that he has long since paid to his subsequent masters more than the \$300 he was bound to reimburse to them; that, notwithstanding such payment, the defendant unjustly detains him as a slave, and has put him in the chain gang of the city. The defendant admitted that he had bought the slave François on the condition set forth in his petition, but averred that, far from said slave having reimbursed the \$300 he gave for him, he had not even paid his monthly wages; that he has been often deprived of the services of François, by his running away during several weeks; that, on account of this bad habit of running away, coupled with the still worse habit of drinking spirituous liquors, he has been obliged to lodge said slave in jail, as the only means of correcting his bad habits and securing his person; that even had he really paid the \$300 mentioned in the sale, he could not be emancipated under the laws of the State, by reason of his bad character and habits, &c. The previous vendors, having been called in warranty, answered to the same effect; whereupon, after hearing the parties and the evidence adduced, the judge below rendered a judgment in favor of the defendant. The plaintiff appealed.

So far from showing that the plaintiff complied with the condition under which he was to be emancipated, to wit, the payment of the sum of \$300, the evidence does not even clearly prove that he regularly paid the monthly wages, or rendered the services his successive masters had a right to expect of him as their slave, nor does it establish for him a good character. Undaunted by the barrenness of the record, or the unfavorable evi-

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dence spread upon it, the appellant's counsel has made an effort in favor of his client, which shows his zeal and the resources of his imagination. His whole argument, and a very long one it is, rests upon a conceit, which has, at least, the merit of novelty. The idea is, that prior to July, 1835, his client was worth \$800; that from the moment he paid \$500 to L. Pilié, he became, *eo instanti*, a co-proprietor of himself with his master, for five-eighths of his value; that the partnership thus formed continued between him and his subsequent owners, to whom Pilié could transfer only his interest in the subject matter of the partnership, to wit, three-eighths of his value; that, therefore, he owed to his successive masters or co-proprietors, only three-eighths of his labor or wages, and was himself entitled to the other five-eighths. By means of this division or partition of the wages, the counsel has attempted to show that his client has more than complied with the condition under which he was to obtain his freedom. To this reasoning, or the conclusion it leads to, we cannot assent. A slave cannot become partially free, nor can he, until legally and absolutely emancipated, own any property, without the consent of his master. Notwithstanding the partial payment he had made with a view to purchase his freedom, François, to all intents and purposes, continued to be the slave of Pilié, who was entitled to all his services as such. When he became dissatisfied with him, and sold him on account of his bad conduct, he did for him all he was bound to, by securing to him the means of becoming free on paying to the purchaser \$300, the supposed balance of his value. Until this amount is paid, he must remain the absolute slave of the defendant.

Judgment affirmed.

Ducros v. Jacobs.

GUSTAVE DUCROS v. ANGELINA G. V. JACOBS.

An allegation in a petition, that a note was duly protested, is a sufficient averment of demand of payment. A special averment is not absolutely necessary.

The plea of the general issue, in an action against the endorser of a note, throws upon the plaintiff the burden of proving all the facts necessary to a recovery, to wit: demand of the maker, protest, and notice to the endorser.

The written proof of notice of protest, provided by the act of 13th March, 1827, does not exclude parol evidence thereof.

The notary by whom the protest was made is a competent witness, in an action against the endorser of a note, to prove notice to the latter.

An agent may be a witness in all cases, except in suits against the principal on account of the negligence of the agent. In such cases, he cannot be a witness for the principal.

APPEAL from the City Court of New Orleans, *Collins, J.*

Marsoudet, for the plaintiff.

Greiner, for the appellant.

MARTIN, J. The defendant is appellant from a judgment against her as endorser of a promissory note.

She resisted the claim on the ground, that there was no allegation of a demand on the drawer, and therefore no evidence of it could be received; and that the costs of a suit previously brought for the same cause of action, in which there was a judgment of non suit, have not been paid.

On the merits, the general issue was pleaded, but the defendant's signature was admitted.

The petition contains an allegation that the note was duly protested for non payment. As no protest can be duly made without a demand, the averment of a due protest strongly implies a previous demand. A special averment of it is not absolutely necessary.

The receipts of the clerk and marshal for the costs, were filed below.

The defendant's plea threw on the plaintiff the *onus probandi*, of all the facts necessary to entitle him to a recovery, to wit: demand upon the maker, protest, and notice to the defendant. No demand appears to have been made, but the protest attests the impossibility of a demand having been made, as the re-

sidence of the maker could not be discovered, after due diligence being used.

Our attention has been drawn to the case of *Fleming et al. v. Hill* (17 La. 3), in which we held, that a mere averment of due diligence in the protest was insufficient, as it did not enable the court to determine whether due diligence was used, but compelled it to act on the opinion of the notary, who ought to have stated what steps he had taken to discover the residence of the maker, to enable the court to exercise its own judgment on the sufficiency of these steps. In the present case, the protest is liable to the same objection as in the case cited; but its sufficiency has been endeavored to be eked out by the introduction of the notary as a witness. This was objected to, on the ground of his being indirectly interested (C. C. 2260. *Brumgard v. Anderson*, 16 La. 343), as he must be liable in damages to the plaintiff, if he has not duly protested it and given notice. The objection was overruled, and the defendant took a bill of exceptions, on two grounds:

1st. That the law requiring the notary to insert in a protest a detail of the facts from which the use of due diligence is to be ascertained, he ought not to be admitted as a witness, when he has neglected to do so.

2d. That if he appears as such, the interest he has in the suit makes him incompetent.

In the case of *Peyroux v. Davis* (17 La. 484), we stated that we had frequently held, that the written proof provided by the act of the legislature did not exclude parol evidence of the notice of protest, and the notary was examined. The case now before us differs from that, in this, that the notary is now attempted to be repelled from the book on account of an alleged interest, while no such objection was raised in the other case, the notary being principally offered to prove the notice to the endorser. Such a notice is not essentially to be given by a notary: it may be by any indifferent person; while the demand and protest, or the due diligence to find the maker, are essentially to be the acts of a notary.

The question, how far an agent can be a witness in matters connected with his agency, and involving his responsibility, has

Ducros v. Jacobs.

repeatedly been submitted to the decision of this court, and the rule settled by their decision, and recognized by the courts of the other States, appears to be, that an agent can be a witness in all cases, except in such as are brought against the principal, on account of the negligence of the agent; in all such cases, he cannot be a witness for the principal. 13 La. 215. The first judge correctly admitted the witness to the book.

Lastly, it is urged, that the plaintiff was guilty of great *laches*, in neglecting to communicate to the notary a number of facts, which would have enabled the latter to discover the residence of the maker and endorser of the note, although the notary called on him for information on that head.

These facts are, that the plaintiff received the note in payment for a lot purchased by the maker, on which there was a house, a lease of which had been given, and was yet unexpired. It is urged that the house, at the maturity of the note, must have been occupied by the lessee or the purchaser; and that if a call had been made on the premises, the maker would have been found there, or the lessee or tenant, from whom his residence might have been known. The record contains evidence that the maker occupied the house at the maturity of the note. The plaintiff saw the maker about eleven days after the protest, and made no enquiry of him as to the residence of the endorser.

The plaintiff, at the time of the protest, although he did not know the residence of the endorser, knew a house from which she had lately removed; and that she was still in the city, having seen her some time before, and no application was made to discover her residence at the said house by the notary, the plaintiff, or any person on his behalf; nor was any enquiry made in the neighborhood where he had last seen her, for her residence.

On questions of fact, the decision of the first judge has always great weight with us. He has a better knowledge of the parties and of the witnesses. All the circumstances from which the defendant and appellant seeks to obtain a judgment in her favor, were submitted to and weighed by the first judge: they do not present to us sufficient ground to come to a different conclusion.

Judgment affirmed.

Buford v. Johnson.

CHARLES BUFORD v. JOEL JOHNSON.

The certificate of the Governor, under the great seal of the State, is the best evidence of the official character of one styling himself a judge of one of the courts of the State, by whom a commission to take testimony has been executed. Where such evidence is not produced, nor its absence accounted for, parol evidence that the person acted, to the knowledge of the witness, in the capacity assumed by him, cannot be admitted.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. The defendant has appealed from a judgment against him as endorser of a bill of exchange for \$2170, drawn to his order by Smith and Graves, at Grand Lake, Arkansas, on Ward, Moffatt & Co., of New Orleans. Our attention has been drawn to a bill of exceptions, taken to the opinion of the judge permitting the official capacity of the magistrate, who received certain depositions offered on the trial below, to be proved by the testimony of the plaintiff's counsel. The commission was directed to James Hickman, Esq., or any judge or justice of the peace of Lexington, Kentucky. The return is signed by a person calling himself George R. Trotter, judge of the Lexington City Court. The witness deposed that he has known Judge Trotter many years, has seen him write and sign, and has no doubt of the genuineness of his signature; that before and after the time of executing the commission, he was acting as a judge of the Lexington City Court; that witness never saw his commission, and does not know what Governor appointed him, nor if he was authorized at all to act as a judge, but he saw him acting as such, in October, 1843. The certificate of the Governor, under the great seal of the State, is the usual, and, in our opinion, the best evidence of the fact sought to be established. It was within the reach of the party, and could easily have been procured. The absence of such better and higher evidence of the authority of this person to act as a judge, not being accounted for, evidence of an inferior character, establishing, at best, but a presumption, though perhaps a strong one, of such authority, should not, we think, have been received. The case must, on that account, be remanded for a new trial.

Succession of George B. Ogden—Samuel C. Ogden, Adm'r. and another, Appellants.

It is, therefore, ordered, that the judgment of the District Court be reversed, and the case remanded for a new trial, with direction to the judge to proceed therein according to law, and in conformity with the opinion of this court; the appellee paying the costs of this appeal.

R. H. Chinn, for the plaintiff.

Kane, for the appellant.

SUCCESSION OF GEORGE B. OGDEN—SAMUEL C. OGDEN, Administrator, and another, Appellants.

A creditor of a succession, having a special mortgage, may require the sale of the mortgaged property to be made *for cash*, provided its appraised value be obtained. In this respect his wish must always prevail over that of the other creditors. C. P. 990, 991, 992. C. C. 1163.

Where an administrator has been appointed to a succession, the widow in community, and the tutrix of the minors, who are necessarily beneficiary heirs, have no right to interfere, and have nothing to claim until the debts of the estate are paid, and the administration legally terminated. The sale of the property of such an estate for the payment of its debts, is not subject to the formalities prescribed for the alienation of the property of minors, the beneficiary heir having but a residuary interest in the estate, which can only be ascertained by a full administration. C. C. 1048, 1051.

Administrators are placed by law on the same footing as curators of vacant estates. They have the same powers, and are subject to the same duties and responsibilities.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Micou, for the plaintiff in the rule.

F. B. Conrad, for the appellants.

MORPHY, J. J. P. Benjamin, on showing to the court below that he was a creditor of the succession of the late George B. Ogden, in the sum of \$1,216 67, and that the payment of his claim was secured by a special mortgage and vendor's privilege, on the undivided half of four lots of ground in the suburb Annunciation, obtained a rule on the administrator of the succession, to show cause why the mortgaged property should not be forthwith sold for cash, by the Register of Wills, to pay and

Succession of George B. Ogden—Samuel C. Ogden, Adm'r. and another, Appellants.

satisfy said claim. On a hearing of the rule, the sale prayed for was ordered to be made for cash, after the usual advertisements. From this order, the administrator, and Rebecca Ogden, widow in community and natural tutrix of her minor child, the issue of her marriage with the deceased, have appealed.

This case has been submitted to us without argument. No points having been filed, we are unaware of the ground on which the order of the judge of probates is complained of, or its legality doubted. It appears to us authorized by articles 990, 991 and 992 of the Code of Practice. The first of these articles makes it the duty of the judges of probate, on the application of any creditor of a vacant succession, to cause, on the requisite advertisements being made, so much of the property of said estate as is necessary to pay the debts of the same, which may be due, to be offered for sale and sold at public auction, to the highest bidder, for cash, if the creditor requires it, provided the appraised value be obtained, &c. Article 991 gives the same rights to creditors whose debts are not yet due, and provides that, in such a case, the sale must be made on such terms of credit as will correspond with the falling due of the several claims of the creditors; and article 992 declares, that the principles contained in the two preceding articles shall apply to all successions accepted with benefit of inventory, whether the heirs are minors or of age, and to all successions administered by administrators. These articles, it is true, contemplate that, on the demand of one or more creditors, the administrator must sell a sufficiency of property to pay all the debts of the succession, while, in the present case, the appellee has prayed for, and the judge has ordered only the sale of a particular piece of property to pay a particular debt; but the applicant had a special mortgage on the property, and the record does not inform us whether there are other debts due by the estate: but even if there were any, this court held, in the case of the *Succession of William Porter* (5 Robinson, p. 96), that mortgage creditors of a succession, though it be insolvent, are not bound to wait; that they may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained; and

The Master and Wardens of the Port of New Orleans v. Prats.

that their wish, in this respect, must always prevail over that of the other creditors.

When an administrator has been appointed to a succession, the widow in community, and the tutrix of the minors, who are necessarily beneficiary heirs, have no right to interfere, and have nothing to claim until the debts of the estate are paid, and the administration of it has legally terminated. The sale of the property of such an estate for the payment of debts is not subject to the rules and formalities prescribed for the alienation of minors' property as such, the beneficiary heir having but a residuary interest in the estate, which can be ascertained only by a full administration. The law places administrators on the same footing as curators of vacant estates, and establishes for them the same powers, duties, and responsibilities. Civil Code, arts. 1048—1051. *Towles' Administratrix v. Weeks et al.*, 7 La. 315. *Poultney's Heirs v. Cecil's Heirs*, 8 Ib. 409. *Lawson and wife v. Ripley*, 17 Ib. 246.

Judgment affirmed.

THE MASTER AND WARDENS OF THE PORT OF NEW ORLEANS v. SALVADOR PRATS.

The fees allowed to the Master and Wardens of the port of New Orleans, by the act of 17 February, 1821, are, at least when the services for which they are claimed have been actually rendered, not inconsistent with the constitution of the United States, nor with the act of Congress of 8 April, 1812, admitting the State of Louisiana into the Union.

APPEAL from the District Court of the First District, *Buchanan, J.*

Roselius, for the plaintiffs.

T. H. Howard, for the appellant.

MARTIN, J. The defendant is appellant from a judgment by which the plaintiffs have recovered \$305, being the amount of fees claimed under the act of the legislature, of the year 1821. B. & C's. Dig. 469.

His counsel has placed the case before us, exclusively on the unconstitutionality of the act, which he considers as a violation

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of the constitution of the United States, and especially of the 8th and 10th sections of article 1st, and also of the act of Congress for the admission of this State into the Union, and extending the laws of the United States thereto.

The constitutionality of the act of 1805, which first allowed fees to the Masters and Wardens (B. & C's. Dig. p. 465), has never been questioned, although they have been claimed for nearly forty years. In 1821, the fees, which are the object of the present suit, were established, in addition to those given by the former act. B. & C's. Dig. p. 469. If the former fees be constitutional, nothing has been said to induce us to pronounce the latter unconstitutional, except that the act of 1821 authorises the demand of the fees, although the services intended to be remunerated, were not rendered. The difficulty which this circumstance presents, vanishes before the admission that, in this case, the services for which remuneration is demanded, were actually rendered.

Judgment affirmed.

ENOCH R. MUDGE and others v. THE COMMISSIONERS OF THE EXCHANGE AND BANKING COMPANY OF NEW ORLEANS, and THE ST. CHARLES HOTEL COMPANY.

There is a strong analogy between the *cessio bonorum* of an insolvent and the administration of the surrendered property by his syndics, and the liquidation of banking corporations, by commissioners, under the acts of 14 and 26 March, 1842. In both cases, the property vests, in effect, in the creditors, and the former owner has no longer any right or interest, but that of receiving the *residuum* after the payment of all the debts, and, for that purpose, of coercing a final settlement by the commissioners. Neither the insolvent debtor, nor the stockholders of the insolvent corporation, can appear in court to control the administration of the assets. The legislature have power to provide for the distribution among the creditors of the property of insolvent corporations, whose charters have been forfeited; and the acts of 14 and 26 March, 1842, for the liquidation of banks, are insolvent laws applicable to such corporations.

The act of 25 March, 1844, incorporating the St. Charles Hotel Company, is not inconsistent with any provision of the constitution of the State, or of the United States. It does not impair the obligation of any contract, nor destroy any vested

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right ; nor did the legislature, in its enactment, exercise any other than legislative power.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Josephs and Grymes*, for the appellants.

Barker and Benjamin, for the defendants.

BULLARD, J. The petitioners represent that they are either stockholders of the Exchange and Banking Company, or its creditors. That in virtue of several acts of the legislature, that institution was duly put into forced liquidation by a judgment of the District Court of the First District, and that commissioners were appointed to liquidate said institution according to law. That as stockholders and creditors, all its property was and is vested in them, as stockholders, to the extent of their interest, and that, as creditors, said property forms the common pledge for the payment of their claims and demands. That, on the 25th March, 1844, the legislature passed an act incorporating a company by the name and style of the St. Charles Hotel Company, and did direct and enact that the said liquidating commissioners should transfer and convey to the said St. Charles Company, the building and lots composing the St. Charles Hotel, with all its furniture and appurtenances, which is of great value, and comprises nearly all the property of said corporation ; and did direct that all the other property or assets should be sold. They represent that all the enactments and provisions of the said act touching the alienation and transfer of the property of the said bank, are repugnant to the constitution of the United States, and utterly null and void, and ought not to be carried into effect ; that it invades the rights of property, and takes from the stockholders of the said bank their lawful property, and vests it in others, not for any public purpose, but for the private benefit of the St. Charles Hotel Company, and deprives the creditors of the bank of their pledge, without providing any adequate, lawful, or valuable consideration or compensation. They pray that the St. Charles Hotel Company, by their president, and the liquidating commissioners may be cited, and that the act of the legislature may be declared unconstitutional and void, and that the commissioners may be ordered to retain the said property and assets, and to proceed with the administra-

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tion thereof. They pray for damages, and for an injunction until the further order of the court. An injunction was accordingly granted.

A majority of the commissioners answer, that they have never consented to, nor refused to comply with the requisitions of the act of the legislature, but they require that the parties try their own rights, and the question, whether they, the commissioners, have the right to transfer the property of the stockholders, as required by the charter of the St. Charles Hotel Company.

The third commissioner answers, that he has always been ready and willing to comply with the law creating the St. Charles Hotel Company, and he submits the question to the decision of the court.

The St. Charles Hotel Company answer, that the Exchange and Banking Company was totally insolvent and unable to pay its liabilities. That it was put in liquidation according to law, and commissioners appointed to carry on the liquidation. That the system of liquidation established by law, being found to be expensive, insufficient, and destructive of the interests of the creditors, a large majority of them presented a petition to the legislature, praying that the assets of the Company should be administered by the creditors themselves, and that the said creditors should be incorporated, and that the assets, consisting almost entirely in the premises known as the St. Charles Hotel, should be transferred to them, thus united as corporators under the style of the St. Charles Hotel Company. That, accordingly, the act in question was passed, which, they allege, is valid and binding, providing especially for the liquidation of an insolvent corporation, divests no property of the stockholders for any other purpose than that of paying their debts, and is in no manner repugnant to the constitution of the United States, or of Louisiana. That the bank being utterly insolvent, the stockholders have no interest whatever in the manner of dividing its assets among the creditors. That none of the creditors are injured by said act, but their interests and rights fully protected. The answer contains other matters which it is unnecessary to set forth, as the case turned, in the court below, altogether upon the constitutional validity of the act incorporating the new com-

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pány, and that is the only question which has been argued in this court. That act was pronounced constitutional by the Commercial Court, and the plaintiffs appealed.

We have had occasion more than once to pronounce upon the analogy which exists between cases of a surrender by insolvent debtors to their creditors and the administration of the property by them surrendered by syndics, and the liquidation of corporations put in liquidation under the acts of 1842, and administered by commissioners. In both, the property vests, in effect, in the creditors, and the former owner has no longer any right or interest, except that of receiving such *residuum* as may be left after the payment of all the debts. It follows, that neither the insolvent debtor, nor the stockholders of an insolvent corporation, have any faculty to appear in court to control the administration of the assets. Their title is divested, and they retain no other right than to receive a *residuum*, and, for that purpose, perhaps, to coerce a final settlement by the commissioners. Such of the plaintiffs, therefore, as base their right to sue on the fact that they were stockholders, cannot maintain their action; and our attention must be confined to the case as it relates to the creditors of the Exchange and Banking Company.

And this brings us to the enquiry, what is the true character of the new corporation, styled the St. Charles Hotel Company? The preamble to the act of incorporation contains the key to its construction. It is recited that certain creditors of the Exchange Bank have represented that, in their opinion, the interest of the creditors of said bank imperiously requires that the St. Charles Hotel, which comprises a large portion of the value of the assets of the said bank, should be divided into shares of small amounts, and sold at public auction, payable in the obligations of the said bank. To carry out these views the new corporation was created, with a stock divided into twenty thousand shares, estimated nominally at twenty-five dollars per share. Twelve thousand shares are to be handed over to the commissioners for liquidating the bank, to represent the hotel and appurtenances, which is to be transferred to the new corporation, subject to its liens and incumbrances; and the other eight thousand shares are to be sold to pay off the incumbrances, and for carrying into

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effect the objects of the incorporation. It is made the duty of the liquidating commissioners to sell the remaining assets of the bank, payable in the obligations of said bank, and, immediately after the sale of the other assets, to dispose of said twelve thousand shares to the highest bidder, after certain public notices, not more than three thousand shares in any one month, and not more than one hundred shares in a lot, payable in the obligations of the Exchange and Banking Company, or specie, or in part of each, at the option of the purchaser; and it provides that the whole concerns of said bank shall be closed on or before the 1st of January, 1845, when the commissioners shall file their final *tableau*, on the homologation of which they shall be discharged. The hotel thus transferred to the new company is to be administered by directors chosen by the stockholders.

Thus the creditors have their choice to become stockholders in the new corporation, by purchasing stock, and giving in payment their claims against the bank, or to come in for their distributive share of the assets upon the final *tableau* of distribution, and thus receive their proportion of the assets, including the proceeds of the twelve thousand shares representing the hotel, which the commissioners are directed to sell.

We concur in the opinion expressed by our learned brother of the Commercial Court, that the power of the legislature to provide for the distribution of the property of insolvent corporations which have forfeited their charters, among the creditors, is undoubted, and in considering these acts for the liquidation of banks in no other light than as insolvent laws applicable to such corporations. If the legislature had authorized and directed the commissioners to sell the hotel in small shares, payable in claims against the bank, or in specie, so that each creditor could have purchased to the amount of his credit, or come in afterwards upon the *tableau* at his option, he could not have complained of any violation of vested rights, nor of the impairing of the obligation of his contract, any more than a creditor, in an ordinary *concurso*, when the property surrendered has been sold for the benefit of all the creditors, and each has an opportunity afforded him to receive his just share; and if he comes in

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upon the *tableau*, he receives a part of the price of the property sold to make up the fund to be distributed.

But it is said that the property belonging to the bank has been, by legislative authority, declared to be the property of a new corporation, and that the legislature can exercise no such authority.

To this it must be remarked, that, in order to ascertain the true character of these enactments, all parts of the statute must be taken together. A critical examination will show, that the directors of the new corporation became essentially trustees for such of the creditors as choose to become stockholders by exchanging their claims against the bank for stock in the hotel company; that the price of the hotel is not limited, because the stock to be placed in the hands of the commissioners, although nominally at twenty-five dollars per share, may sell for more or for less, and may be purchased by the creditors themselves; and that the authority of the commissioners is not superseded, but that they are required to dispose of the assets, and make the distribution; and that, in substance, they sell the hotel in shares, the whole to be kept by the new directors, in trust for the new stockholders; and that the legislature reserves the right of repealing the act altogether.

Instead of the commissioners proceeding directly to sell the hotel in shares, for the more convenient distribution of its proceeds among the creditors, the legislature has chosen to adopt a more circuitous method, by interposing the machinery of a new corporation to co-operate with the commissioners. The result appears to us essentially the same. The policy or expediency of the measure is no question for us: our only enquiry is, has it impaired the obligation of any existing contract, or destroyed any vested right? or has the legislature, in the enactment of the statute, exercised judicial, or any other than legislative power?

The case, in every aspect, differs essentially from the celebrated and leading one of Dartmouth College, upon which the counsel for the appellants rely. In that case, an ancient and venerable institution, founded originally by private munificence, and deriving its corporate existence from the crown before the

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Revolution, was, by an act of the legislature of New Hampshire, despoiled of its property and its franchises, which were conferred upon a new corporation, without any forfeiture declared by legitimate authority. That act was justly pronounced to involve a violation of an existing contract, and to be unconstitutional. 4 Wheaton, 640. In the present case, the original corporation was dissolved by judicial authority. Its effects, according to the existing laws, were to be disposed of by commissioners for the benefit of the creditors; and the act now under consideration was passed to facilitate the commissioners in selling, in shares, the principal piece of property, a large and valuable hotel, so as to make it available in the most advantageous manner, to pay the debts of the insolvent bank. We are not satisfied that it is unconstitutional; and it is only in a very clear case that we should think ourselves authorized to pronounce an act of the legislature void.

Judgment affirmed.

 LOUISE JOSEPHINE BAUDUC v. PETER CONREY.

10r	466
106	159

10r	466
113	272
113	455

10r	466
116	817

10r	466
121	597

10r	466
f122	794

Where a contract is attacked on the ground of fraud, parol evidence is admissible to prove the allegations of fraud upon which the contract is sought to be annulled, whenever the consent of the complaining party is shown, under the allegations, to have been the consequence of the fraud. But such evidence is inadmissible to establish a verbal agreement of the defendant to transfer real property, and a fraudulent refusal on his part to comply therewith. C. C. 2255, 2256.

The answers of a party to an action, interrogated, under art. 2255 of the Civil Code, as to a verbal sale of an immovable, denying the sale, cannot be contradicted.

A plaintiff can neither require the performance, nor recover damages for the non-performance of an agreement, without legal proof of its existence.

A party cannot complain of a sale, made by the sheriff, of real property, in block, unless it be alleged and proved that she requested the officer to sell it in separate parts.

APPEAL from the District Court of the First District, *Buchanan, J.*

Greiner, for the appellant.

Schmidt, for the defendant. Every transfer of immovable property must be in writing. Civil Code, art. 2255.

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Parol proof is inadmissible to prove a sale, or agreement to sell real estate. *Muggah v. Greig*, 2 La. 596. *Badon v. Badon*, 4 La. 169. 7 La. 274.

Parol evidence cannot establish title to real estate. *McGuire v. Amelung*, 12 Mart. 649. *Boudreau v. Boudreau*, Ib. 667.

If a party being interrogated, deny the sale of immovables, his answer cannot be contradicted. *Bach v. Hall*, 3 La. 116. *Patterson v. Bloss*, 4 Ib. 377. *Allison v. Fox*, 5 La. 459.

SMON, J. This action is based upon a pretended verbal agreement, alleged to have existed between the plaintiff and the defendant, in relation to the purchase of certain lots bought by said defendant at a sheriff's sale, and to the retransfer thereof to be made by said defendant to a third person, for the benefit of the plaintiff. The allegations set up in the petition show, in substance, that the lots in question were purchased in 1840, by one Nadaud, who gave his three promissory notes in part payment thereof, each for the sum of \$500; that said lots were mortgaged to secure the payment of the notes; that subsequently the lots were sold, successively, to different persons, as being subject to the mortgage, and that they became the property of the petitioner, in November, 1840. That the defendant having become the holder of the notes, and having obtained a judgment thereon, caused the lots to be seized and sold by the sheriff; that the petitioner, bought them at the sheriff's sale, on a credit of twelve months; that, at the maturity of her bond, being unable to pay, the lots were seized and advertised for sale, to take place on the 7th of October, 1843; and that previous to said day, the petitioner had an interview with the defendant who agreed that if the property did not sell for its real value, or for more than the amount of his claim, he would bid the property off in his own name and transfer it to her at any time during the next succeeding six months, if she would pay the amount of his claim, interest and costs, within that time; or, in case she could find a purchaser within that time, at a price which she thought the value thereof, said defendant agreed to transfer the property as she might indicate. She states that she assented to this proposition, and required a writing to be made, to which said defendant replied, that the agreement would be the same though verbal, and

that she did not insist upon it; that she, accordingly, exerted herself to prevent persons from bidding for the property, which was finally adjudicated to the defendant, for \$1000, which is not more than one-fourth of its value, and that said lots were sold in block, when in fact it would have been more advantageous to her, if they had been sold separately.

She further represents that before the expiration of the six months, being unable to pay, she applied to the defendant for an extension of time, until the 7th of October, 1844, in consideration of her paying interest on the claim of \$15 per month, to which said defendant assented under the previous conditions; and that it was further agreed, in case she or he could find a purchaser, the balance of the proceeds of the sale should go to her, after satisfying the defendant's claim *in toto*. That after enquiry, she found a purchaser of said property, for \$3000; that she informed defendant of the fact, and requested him to make the transfer to the person in accordance with the agreement, but that the defendant refused to transfer the said property, whereupon she saw that he had acted in bad faith, and was disposed to defraud her; that she immediately caused an act to be prepared by a notary for the transfer of the lots, notified the defendant thereof, and made him a legal tender of the full amount of his said claim against her, with interest, &c., which he refused to take and to make the transfer.

She further sets up allegations of fraud and false representations on the part of the defendant towards her, clearly intended *to lull her into security* against any danger of being defrauded; states that she could at all times have obtained more than \$2500 for the property, had not the defendant made her divers false representations as to *his intending to comply with his verbal agreement*; that she would have caused the property to be sold legally by the sheriff, in separate lots, and at the highest price, if she had not believed defendant's representations, and *relied on his promise*; or that she could have obtained a loan and paid the debt, as she was enabled to do as soon as she discovered the fraud and the false representations of the defendant, in consequence of which, she has been by him defrauded in the sum of \$2000.

She prays that he may be condemned to transfer the property to the third person named in the petition, or to herself, on her

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paying the amount of his claim ; or that she may have judgment against him for \$2000 damages, sustained by reason of the fraud and false representations practiced upon her by the defendant ; and that he may be ordered to answer ten different interrogatories, intended to prove the alleged agreement.

The defendant joined issue by denying, generally and specially, all the allegations of the petition ; further setting up his sheriff's sale and the circumstances under which it was made, and alleging that he attended the sale with a view to protect his interests, and to buy the property rather than to subject himself to be baffled in obtaining payment of his judgment ; that he was not desirous of buying the property ; but that when the plaintiff represented herself to be the wife of Nadaud, he consented to give her an opportunity of redeeming the property, and to transfer it to her, if, within three months from the day of the sale, she should pay him the whole judgment, &c. He further avers, that this promise was made under the persuasion that she was Nadaud's wife, as she represented herself to be, and that had he known the contrary, he would not have made her any promise at all.

Under these pleadings, the parties went to trial. The answers of the defendant to interrogatories were taken ; his testimony was also taken as evidence in the cause on behalf of the plaintiff ; other parol evidence was offered by plaintiff and rejected by the court ; and, judgment as in case of a non suit having been rendered in favor of the defendant, said plaintiff has appealed.

The answers of the defendant to the interrogatories propounded to him, prove, in substance :

First, That he bid off the property in question at a sheriff's sale, for \$1000.

Second, That the plaintiff, representing herself to be the wife of L. A. Nadaud, he was induced to offer her the privilege of redeeming the property for her benefit, at any time within three months from the date of the sale, on the payment of the amount of his claim, which offer he would not have made, had she not represented herself to be Nadaud's wife. *Third*, That he did not request Nadaud to speak to the persons present at the sale, and

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prevail upon them not to bid. *Fourth*, That at the last sale, there was no appraisement; but at the first sale, he was told that the property was appraised at \$2,500. *Fifth*, That he allowed the plaintiff three months to redeem the property, under the belief that she was Nadaud's wife. *Sixth*, That he did not require the plaintiff to pay him interest, but agreed to rent her the property at \$15 per month, payable monthly, which rent she has paid, and plaintiff occupies it as his tenant. *Seventh*, That he has never offered to transfer the property to the plaintiff, in the manner mentioned in the petition; but that he recollects having told her to let him know if an offer was made to buy it; that he never promised her, nor intended to give her the profits which he could realize from the sale, nor to allow her to redeem the property after the lapse of the first three months after the purchase, &c. *Eighth*, That he is not aware that any request was made to him by Nadaud to put the agreement in writing; and that if it had been, he would not have acceded to it. *Ninth*, That when the tender was made to him, he did not say he wanted a few days to make up his account, but said he wanted time to consult his attorney. *Tenth*, That he would estimate the property, at present, at \$2,500 or \$3,000, as it has increased in value since he bought it.

The testimony of the defendant proves pretty much the same facts, except that the circumstances are more detailed; but it contains also certain facts which are not stated in his answers to the interrogatories. He says that he told the plaintiff, previously to the sheriff's sale, that he would bid for the property to the amount of his claim, and if any one bid more he had nothing to say; that being called on by the plaintiff, before the expiration of the three months, for further time, he told her that he could not give her any more time, but that he would continue to consider her as his tenant, on paying \$15 per month rent, for the balance of the year; that he refused uniformly to transfer the property after the three months; that plaintiff was to redeem the property for herself and children, and not with a view to speculation; and that if he had not believed the plaintiff to be Nadaud's wife, he would have had nothing to do with her, as his object was to save Nadaud's wife and children from distress.

The whole testimony is a direct contradiction of the allegations of the petition, and presents the case under a very different aspect. It is such as to destroy the plaintiff's action, not only in relation to the transfer of the property, but also with regard to her claim for damages, which, under the evidence adduced, could not, for a moment, be countenanced.

The case, however, is before us upon two bills of exception, from which it appears: 1st, That the judge *a quo* rejected parol evidence to prove the agreement and facts set forth in the petition, and the fraud therein alleged. 2d, That he refused to permit the plaintiff to introduce in evidence the sheriff's return of the sale, the appraisement and other proof, to show that the property in contest would have sold for a much larger sum, in separate lots, than in block, &c.

I. On the first bill of exceptions, we think the judge *a quo* did not err. The evidence offered had a tendency not only to prove the verbal agreement declared upon in the petition, but also to contradict the defendant's answers to the interrogatories, and the statements by him made in his testimony taken and introduced as evidence in the cause *on behalf of the plaintiff*. We are not ready to controvert the doctrine, that a contract may be attacked on the ground of fraud, and that parol evidence is admissible to prove the allegations of fraud and deception upon which such contract is sought to be annulled, whenever the consent of the party complaining is shown, under the allegations, to have been the consequence of the fraud. But here, although the petition alleges that the defendant acted fraudulently towards her, in the purchase of the property which she seeks to take from him, it is manifest that the fraud which she complains of, if any ever existed, consists rather in his not complying with the alleged verbal agreement, than in the means which he may have employed to obtain his title to the property in dispute at the sheriff's sale. The principal ground of this action is, that the defendant promised to transfer said property to the plaintiff, or to another person, and that he fraudulently refused to carry the agreement into effect; and the evidence offered is intended to establish the said agreement by parol proof, in violation of the law which says, that every transfer of immovable property

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must be in writing, and that no parol evidence shall be admitted to prove it, or to prove against or beyond what is contained in the acts, &c. Civil Code, arts. 2255, 2256. This is really an attempt, under allegations of fraud bearing on the effect of the defendant's refusal, to prove an agreement to sell real property by parol evidence, and to compel the defendant, under a verbal promise, to transfer it, or give a title thereto to a third person for the benefit of the plaintiff; and we cannot hesitate to say, that it was properly rejected below. 12 Mart. 649, 667. 2 La. 596. 4 Ibid, 169. 7 Ibid, 274, and case of *Breed v. Guay*, ante, p. 35. In the case of *Delahoussaye's Heirs v. Davis' Heirs*, 19 La. 410, in which similar allegations of fraud were made in the petition, we held that, whether the agreement, which invested Davis with the title to the property in dispute, was, or was not fraudulent, parol evidence was equally inadmissible. Here, also, although it is alleged that the property was adjudicated to the defendant, in consequence of his false and fraudulent representations, the plaintiff does not pray in her petition that the sheriff's sale be annulled and set aside; and it is clear that she cannot be allowed to introduce evidence which would go to invalidate it, and thereby to give her a title to the property based only upon a verbal agreement. The case of *Broussard v. Sudrique*, 4 La. 351, relied on by the plaintiff's counsel, is not applicable; as in that case, parol evidence was admitted to show the error alleged to have existed in the contract, in the substance of the thing bought, and as the allegation of fraud was under the facts stated in the answer, closely connected with the error complained of.

But, there is another reason why the evidence was properly rejected. The plaintiff, after having thought proper to probe the conscience of her adversary, by propounding to him ten interrogatories, which he answered in open court, on the 29th of May, 1844, resorted to his testimony six months afterwards, on the trial of the cause, and offered him *as her witness*, in support of the allegations contained in the petition. He was examined in her behalf, and was cross-examined by the adverse counsel, and his evidence comes up with the record. We have already remarked, that this testimony is such as to destroy the

plaintiff's action, as it proves that the plaintiff's allegations are unfounded; and it appears, by the bill of exceptions, that the object of said plaintiff in introducing the parol evidence which was rejected, was *to prove the facts set forth in her petition*, and thereby to contradict the defendant's testimony; this, we think, she cannot be permitted to do. It is well settled that if a party, being interrogated on facts and articles, under art. 2255 of the Civil Code, deny the sale upon which his answers are required, his said answers cannot be contradicted (3 La. 118); for then it would be establishing the sale of an immovable by parol testimony; and it is, perhaps, a sound principle of evidence, that a party cannot be allowed to contradict his own witness, so as to discredit his testimony (1 Starkie, part. 2, § 29); for, as this author says, it would be unfair that he should have the benefit of the testimony, if favorable, and be able to reject it, if the contrary.

With regard to the point, that the evidence was admissible in support of the claim for damages as being the result of the breach of the agreement, it suffices to repeat what this court said in the case of *Allison v. Fox*, 5 La. 460. In order to show the breach, the contract must be proved; and if it cannot be proved, or, what is the same thing, not proved by legal evidence, there can be no longer a breach of it. See also 4 La. 377, in which we held that "he who claims damages for the non execution of a contract, must prove that it was actually entered into, in the same manner as if he required the specific performance of it." Here, the plaintiff requires the performance of the agreement, or the payment of damages, and we think that neither can be allowed, without legal proof its existence.

II. On the second bill of exceptions, we concur with the judge *a quo* in the opinion, that the evidence offered was inadmissible. The object of the plaintiff was to prove that a more advantageous sale could have been made, if the property had been sold in separate lots, and not in block. It is not alleged in the petition, that she ever required the sheriff to appraise the lots together or separately, so as to have them offered for sale to the best advantage, as she might direct, on the day of the sale (Code Practice, art. 676); and it is not even alleged

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that she ever directed the sheriff to sell them separately. The prayer of her petition does not seek to annul the sale, on the ground of any informality in the sheriff's proceedings; and as the evidence was intended to show that the sale was not made to the best advantage, we cannot see the bearing of it, without allegations to that effect. It is clear that she cannot complain of the sale made by the sheriff of the property in a lump, unless she alleges and shows that she vainly required him to sell it in distinct and separate parts.

On the merits, the judgment appealed from appears to be fully sustained by the evidence, so far as it was admitted under the pleadings.

Judgment affirmed.

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SUCCESSION OF JEAN BAPTISTE DESORME—BENJAMIN POYDRAS DE LALLANDE, Syndic, Appellant.

The syndic of the creditors of an insolvent is responsible for the whole proceeds of the sale of the estate, as shown by the *procès-verbal* of the sale. Where credit is claimed for any sum, he must show that he used proper diligence to secure and collect the amount.

Interest will be allowed on debts due by estates administered by curators, executors, or administrators, if the estate be sufficient, from the death of the debtor, if then due, or, from the time of becoming due, if after that event, though no judicial demand have been made (C. P. 939); but this interest cannot exceed five per cent on debts, on which a higher rate has not been stipulated in writing by the terms of the contract.

Compound interest cannot be recovered.

Where the syndic of the creditors of an insolvent pays money without authority from the court, he cannot require that the persons so paid shall be made parties to any proceedings against him, to render him responsible for the sums thus paid.

APPEAL from the Court of Probates of Pointe Coupée, Cooley, J.

L. Janin, for the appellant.

T. J. Cooley, contra.

GARLAND, J. This is the third time that this case has been before us. See 15 La. 15. 17 La. 111. After it was last remanded, the heirs of Desorme, who had obtained a reversal of the

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judgment and a new trial, filed a specific opposition to the account presented by the syndic, in which they allege that it does not present a fair and full view of the manner in which he has administered the estate; that a portion is concealed; and that the proceeds of the sale, and of a crop of cotton, are not fully accounted for. They aver that the account of debts paid is erroneous, and not supported by vouchers or legal proof; that compound interest, at the rate of ten per cent per annum, has been allowed on many claims against the estate which bore no interest at all, or only at the legal rate; that improper charges against the estate have been made, and that just and legal credits have not been allowed; and, finally, that as an unfaithful administrator, the said syndic is not entitled to any commissions, or to be credited by a sum of \$200, which is given as the cost of making out the account.

When the cause came on for trial, the syndic presented a number of vouchers in support of his account. They seem to have been admitted in evidence without objection, and we shall, therefore, give them all the weight they are entitled to. Previous to paying the debts, he did not seem to have considered it necessary to make out a list and classification of them, to be presented to the Probate Court for its sanction and order for payment, but took upon himself to judge of their validity. In many instances, he allowed interest at the rate of ten per cent per annum, on claims bearing no interest at all, and compounded at that rate. He did not show that he had used due diligence to collect all the money for which the estate was sold; and other irregularities in the management of the succession, and delays in rendering an account were proved. The property was sold, in May, 1833; about \$2500 was received, in cash, at that time, and the remainder became due in the month of March, in the years 1834, 1835, and 1836. By the terms of the sale, good security was to be taken for the purchase money, and a mortgage was retained upon the lands and slaves. No account was presented to the Court of Probates until the month of October, 1838, and then a credit for more than nine hundred dollars is claimed, for sums not collected, without the least evidence of

any diligence to collect the various sums composing that amount.

The Probate judge, after an examination of the account and vouchers, decided that the syndic must account for the proceeds of all the property sold, as he had not shown any diligence to collect the sums said to be still owing. Secondly, that he had no right to allow interest at the rate of ten per cent per annum on debts not bearing interest at that rate by agreement, much less to compound that interest, as was done in many instances. He held, as it finally appeared that the estate was able to pay all the debts, that interest at the rate of five per cent per annum was properly chargeable from the time of the decease of Desorme, and so reduced the account. Thirdly, it was decided, that the charge of compound interest on the claims bearing ten per cent per annum, was incorrect, and ought not to be allowed. Upon these principles the account was settled and reduced, and a judgment for \$1,467 44, with interest at the rate of ten per cent per annum, from the 1st day of April, 1836, was given against the syndic, from which he has appealed. The charges for commissions, and the sum of \$200, the expense of rendering the account, were allowed.

The present counsel for the appellees, asks us to dismiss this appeal, because the record was not filed in this court in proper time. We think this motion ought not to prevail, as the counsel for the appellant was, in our opinion, fully excused, if not entirely justified, in keeping the record in his possession, after the letter he received from the counsel of the appellees who preceeded the gentleman now employed, and the understanding consequent upon it. The motion involves no question of law, but depends upon the interpretation of an agreement entered into by counsel, then competent to conclude it.

Upon the bill of exceptions taken to the rejection of the deposition of judge Robin, we do not find it necessary to express any opinion. The object of it was simply to prove, that when the syndic filed his account in 1838, the usual notices, by advertisement, were given, and a call made on all persons interested to come forward and oppose its homologation, if they thought proper. The present opponents do not complain of a

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want of notification, and the appellant is not in any manner injured by the rejection of the evidence. The objections to the account are entirely to the merits, and vouchers filed in support of it; and the fact of notice being given, has not the least influence upon our minds in coming to the conclusions we have arrived at.

We are of opinion upon the merits, that the probate judge was correct in holding the syndic accountable for the whole amount of the proceeds of the sale, as it appears on the *procès-verbal*. If a credit for any sum is claimed, it is the syndic's duty to prove that he had, in the first instance, used all proper diligence to secure and collect the money. It is not sufficient, as is done in this case, merely to say that the debtors are in delay, without an effort being made to collect the debts after a lapse of more than six years. This doctrine is too plain to admit of argument, or to require authority to sustain it.

We are further of opinion, that the judge was correct in deciding that the syndic had no right to pay interest at the rate of ten per cent per annum, and to compound it on debts and claims not bearing interest by the terms of the contract. Article 989 of the Code of Practice allows interest on debts, if the estate be sufficient, from the death of the debtor, if the debts were due at that time, if not, from the time they became due. But this does not authorize an allowance of ten per cent; that is only due when specially agreed upon in writing. The legal rate is five per centum, and the syndic was wrong in paying any more. In the early part of his administration, the syndic seems to have had doubts as to the propriety of paying interest at the rate he charges, and, in some instances, it is specified in the receipts, that the interest shall be repaid if it is not legal or rightfully received. Contrary to all expectation this succession turned out to be solvent, and the creditors were entitled to all the law allowed them; but, in the first instance, there was every reason and inducement for caution and a strict compliance with the law, as the estate was supposed to be insolvent; yet the syndic appointed by the creditors, as we have before said, omitted entirely to make a list and classification of the debts, and to obtain the order of the judge to pay them. The

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responsibility for any errors must, therefore, rest upon him. The allowance and payment by the syndic of compound interest on the debts bearing, by contract, ten per cent interest, was, in our opinion, equally unjustifiable and illegal as on the other debts, and the judge was correct in reducing the account in this respect also.

The counsel for the appellant insists that, as these payments were made and an account of them presented to the judge, and approved by him, before the present opposition was filed, the appellant is not responsible, unless the creditors who received these sums be made parties, and he relies upon the decision of this court in the case of *Millaudon v. Cajus*, 6 La., 222. We do not think they are parallel cases. It is possible that had the syndic presented a list and classification of the debts to the Court of Probates, charging the interest and compounding it as he has done, and obtained an order to pay in that manner, it might be necessary to bring in the creditors to get it back again; but when a syndic, or other fiduciary, entirely disregards the plain provisions of the law, and pays without authority, he must take the consequences. He cannot send the heirs in search of those to whom he has illegally paid the money of the estate, and get a credit for it in a settlement with them; he must himself take the necessary means to get it back again.

The counsel further contends, that the appellant is not responsible for interest at the rate of ten per cent per annum on the sum he is indebted to the heirs. Until the act of 13 March, 1837 (Bull. & Curry's Dig. p. 499), this was possibly true; but the 6th section of that act makes it the duty of every syndic, or other representative of a succession, to render an account to the Court of Probates at least once in every twelve months, and, on his failure to do so, imposes the obligation of paying ten per centum per annum interest. The appellant failed for more than five years to render an account; he had money belonging to the estate in his hands for a long time, without paying the debts, and thereby caused the claims for interest to be considerably increased against the estate. We think substantial justice has been done between the parties.

It is, therefore, ordered and decreed, that the judgment be affirmed, with costs.

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SAME CASE—ON A RE-HEARING.

Under the 6th section of the act of 13th March, 1837, requiring executors, administrators, curators, and syndics to render full and fair accounts of their administration, at least once in every twelve months, under pain of dismissal from office, and of being condemned to pay interest at the rate of ten per cent a year on all sums for which they may be responsible, from the expiration of the twelve months, the payment of such interest is a part of the penalty, and necessarily coupled with the removal from office, and one cannot be imposed without the other; and such penalties can be only inflicted in cases which have arisen since the promulgation of the act.

The syndic of a succession found, after an examination of his accounts, to owe a balance to the estate, should be condemned, like a curator or executor, to pay interest thereon, at the rate of five per cent a year, from the date of the judgment. C. P. 1007.

L. Janin, for a re-hearing. The Probate Court allowed on the balance found against the administrator, ten per cent interest, for eight years, from the time when the notes given for the purchase of the property fell due.

The Probate Court quoted no authority for this decision. This court considered it justified by the 4th and 6th sections of the act of 1837. This statute provides for a very different case: at all events it cannot produce a retroactive effect, and be construed as imposing a penalty for acts or omissions anterior to its passage. It has been twice expressly decided that it does not apply to syndics or administrators appointed before its passage. *Rodriguez v. Dubertrand*, 1 Rob. 535. *Yard, &c. v. Their Creditors*, 2 Rob. 401.

But the case of *Thomas, Administrator, v. Bourgeat, Executor*, 1 Rob. 406, is so perfectly identical with this, that instead of further argument, the appellant will only transcribe the decision. That also was a suit against the administrator of a succession; the court *a qua* was also the Probate Court of Pointe Coupée, which, in that case, as well as in this, gave ten per cent interest on the balance due by the administrator, from the maturity of the notes given by the purchasers of the property of the estate. The judgment of the Probate Court was reversed, and this court said: "The court, however, gave interest on the balance found due at the rate of ten per cent per annum, under

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the sixth section of the act of 1837, which requires executors, administrators, &c., at least once in twelve months, to render a full account of their administration, under the penalty of being dismissed from office, and paying interest at that rate on all sums for which they shall be responsible, from the date of the expiration of the twelve months. We are of opinion that this statute is inapplicable in the present case. Such a penalty can be given only in cases expressly provided for; and, as the payment of interest forms a part of the penalty, and is necessarily coupled with a removal from office, the one cannot be given without the other. Nor is it justified by the fact that the price of the property sold, belonging to the estate of Williams, bore interest, after maturity, at ten per cent. That stipulation would affect the purchasers, but not the administrator of the estate, who may have received payment from them."

GARLAND, J. The counsel for the syndic has called our attention to that portion of the judgment appealed from which allowed interest against his client at the rate of ten per cent per annum on the sum he is indebted to the heirs. Their counsel alleges that he is liable to pay interest at that rate, under the act of 13th March, 1837. B. & C.'s Dig. 499. We have attentively examined the provisions of the third and sixth sections of that act, and, after mature reflection, are of opinion, that, according to the interpretation given to them by several decisions of this court, the circumstances of the case do not bring the syndic under the operation of them. 1 Rob. 406, 535: 2 Ib. 401. The question then arises, from what date is the syndic responsible for interest, and the article 1007 of the Code of Practice, it appears to us, fixes the rate, and time from which it should run. It says, that if, from a scrutiny of the account, the curator, executor, &c., shall appear to owe a balance, he shall be sentenced to pay it to the heirs or other claimants, with interest from the day of judgment. The syndic of the succession of Desormes may be likened to an administrator or executor, and is liable to pay interest in the same manner. The judgment of the Probate Court must, therefore, be modified, so as to disallow interest at the rate of ten per cent per annum, from April, 1836.

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It is, therefore, ordered and decreed, that the judgment be affirmed so far as it condemns the syndic, Benjamin Poydras de Lallande, to pay to the heirs of Jean Baptiste Desorme, deceased, the sum of fourteen hundred and sixty-seven dollars and forty-five cents; but, as to the interest thereon, at the rate of ten per cent per annum, it is annulled and reversed; and we do order and decree, that said syndic do pay interest on the aforesaid sum of \$1,467 45, at the rate of five per centum per annum, from the 16th day of February, 1842, until paid; the said heirs paying the costs of this appeal, and all those in the Court of Probates to be paid by the said Benjamin Poydras de Lallande.

 JOHN McDONOGH v. AUGUSTE DELASSUS and another.

Where an agent of a third person, believing himself authorized as such to sell certain property of his principal, receives from a purchaser, who also believed that he was authorized to sell, a part of the price, which was paid over to the principal, the purchaser, on discovering the want of authority in the vendor, may recover from the principal the amount so received by him, and this, though a balance may be still due by the agent to the principal, after crediting the former with the amount paid over by him. Art. 2134 of the Civil Code does not apply to such a case.

An agent is bound to deliver to his principal whatever he has received by virtue of his procuration, though unduly. C. C. 2974.

The relation of principal and agent is not that of debtor and creditor from the moment that the agent receives money or property for the principal. It is a trust; and does not give the agent any title to the money or property so received, which would be the case if he were regarded as a debtor. The agent may become a debtor of the principal, but not until the dissolution of the contract of agency, and his neglect or refusal to account and deliver over the funds or property. While the agency continues, the property or money in the hands of the agent belongs to the principal, the agent being a mere trustee.

APPEAL from the District Court of the First District, *Buchanan, J.*

Roselius, for the appellant.

L. Janin, contra.

GARLAND, J. The plaintiff claims as against Auguste Delassus, one of the defendants in the court below, but against whom no judgment has been rendered, and who is not before us, that he

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be decreed to be the legal owner and proprietor of two lots of ground and the stores erected thereon, fronting on New Levée street, being Nos. 58 and 59, and, as such owner, that he be entitled to the possession and enjoyment of the same; and further, that said Delassus be ordered to authorize his wife to sign a renunciation in favor of the petitioner, and to give him an unincumbered title to said property; and, in case the court should be of opinion that his (petitioner's) claim to said property is not valid, and that an unincumbered title ought not to be executed by Delassus, then he prays that L. B. Macarty be decreed to pay him the sum of seven thousand dollars, with legal interest; but, if the title to said two houses and lots be declared valid against Delassus, then he prays for a judgment against Macarty for two thousand dollars, with interest.

The facts upon which these claims are founded, are, that, in the year 1840, the defendant Macarty being about to absent himself from the State, for a considerable length of time, if not altogether, gave his power of attorney to Delassus, conferring on him as extensive powers in relation to the administration and management of his property and funds in this State as could well be given, and, among many special powers granted, was an authority to purchase any real estate that might be mortgaged to him, and also power to sell, on such terms and conditions as the agent should think advisable, a large quantity of immovable property, which was mentioned in the act. Under this power of attorney, Delassus proceeded to manage and control the property and business of his principal, until some time in the year 1843, when the property of D. T. Walden, a bankrupt, was offered at public sale by his assignee. Upon nine lots of ground and the stores erected on them, so offered for sale, Macarty had a mortgage, and, as appears from the marshal's deeds of sale, Gasquet became the purchaser of two of them, Macarty of five, and Delassus of two. Some questions have arisen about the adjudications made at the sale and their legal effect; but it is not necessary to notice them here. From the evidence it appears, that Delassus was under the impression that all the lots and stores had been adjudicated to him as the agent of Macarty, and it is admitted in the record, that he would swear that he believed that, under the power of

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attorney, he had authority to sell them ; and the evidence leaves no doubt on our minds that McDonogh entertained a similar belief. Accordingly, a verbal agreement was entered into by which Delassus, as agent as aforesaid, was to sell the nine lots and stores to McDonogh, for \$22,500 cash, being at the rate of \$2,500 each. Some short time after this Delassus represented, that two of the lots had been, contrary to his expectation, sold to Gasquet, and that he could only convey seven stores, which McDonogh agreed to take ; and, at the request of Delassus, who represented that he had an urgent use for money to remit to his principal, McDonogh advanced \$7,000 on the price, and on the following receipt : "Received from Mr. John McDonogh seven thousand dollars, on account of the property sold him, as per act of sale to be passed before H. B. Cenas, Esq., notary public ; said property is composed of seven stores, from the estate of D. T. Walden, Esq. New Orleans, April 18th, 1843. (Signed) Per Proc. L. B. Macarty, AUGUSTE DELASSUS." Of this sum it is clearly proved, that \$6,000 was, on the same day, invested in two bills of exchange, which were remitted to Macarty in Paris, who it is admitted received the same, and got the money for them, which he has used. The remaining \$1,000, Delassus swears was employed in paying a debt for which Macarty was responsible. The power of attorney, and other necessary papers, were put into the hands of Cenas, the notary, to draw up the act of sale for the seven lots and stores, who, when he examined the former, discovered that although Delassus had an authority to purchase property, yet he had no authority to sell any but what was specified, and these lots made no part of the special property. This discovery, as a matter of course, put an end to the transaction. Delassus then told McDonogh, that the title to two of the lots and stores, to wit, Nos. 58 and 59, were in his own name, and that he would convey him those two, which was agreed to, and an act of sale, dated the 28th of April, 1843, was drawn up by the notary, Cenas, and signed by both Delassus and McDonogh, and attested by one witness, and so left for the purpose of obtaining the signature of Madame Delassus to her renunciation of all rights of mortgage and privilege, which formed a part of the

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act. On the 18th of May, 1843, Delassus, for reasons stated in the letter of his attorney at law (which it is not necessary to state here,) addressed to the notary, declined proceeding to the completion of the act, and it remained in that situation.

From the accounts rendered by Delassus to his principal, for the months of May, June, July, August, September, October and November, 1842, it appears that at the end of each of those months, he had a large sum in his hands belonging to his principal. At the close of the last named month, the sum amounted to \$84,968 78. The instructions of Macarty were, that \$8,000 per annum were to be remitted to him in France, of which sum one-half was remitted semi-annually; the remainder of his funds the agent was to invest in this State. Delassus says that, at the time he got the money from McDonogh, he was then \$6,000 in arrear of this remittance, and that he had no money of Macarty's at the time, and could not have remitted him any unless he had received this money from McDonogh. He received other sums of money for Macarty, subsequent to November, 1842, but at what time, or how much, is not stated. It is not proved, nor contended that Macarty knew, when he received the \$6,000, from whom, or how Delassus got it.

The foregoing appears to us a fair statement of the testimony, so far as it relates to the controversy between the plaintiff and Macarty. Those portions of it which relate to the difficulty between the former and Delassus, we have endeavored to keep apart, as it seems to us that the consideration of the case has been much confused by arguing it as though it had been tried with Delassus, and he was a party before us. From the same cause, perhaps, has arisen some of the errors into which we think the district judge has fallen, who rendered a final judgment for the defendant Macarty, from which the plaintiff has appealed.

In his judgment the district judge says, that "the case has been tried as regards the defendant L. B. Macarty alone, upon the issue made up by his answer and supplemental answer." It is, therefore, important to see what those issues are, and whether they should have been tried without Delassus being before the court. The judge says truly, that those issues are not alto-

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gether consistent with each other, nor are they responsive to the demand the plaintiff sets up against Macarty. He no where asks for a judgment against him for the two lots and the houses on them. That portion of the demand is directed against Delassus alone, and the demand against Macarty is exclusively for money; yet the court below has proceeded on the irrelevant and inconsistent pleas of one defendant, to decide a claim set up by the plaintiff against the other, who has filed no answer, and was not a party to the trial. In his first answer Macarty admits that Delassus held his power of attorney for specified purposes, and that the property at Walden's sale was adjudicated to J. R. Jennings and Madame Lalaurie, and that the assignee of Walden had conveyed it to Delassus, all of which he says, is contrary to law, and that those sales are void. He then proceeds to say that, he is informed, that Delassus purchased the property for him; but he avers that he had no authority to do so, and he refuses to acknowledge or ratify the purchase, wherefore the sale is null, and the property should be restored to the assignee of Walden, to be sold according to law; but if the sale is not annulled, then he says that he reserves his recourse on the assignee, who he prays may be made a party; and further avers that the sales to Delassus were intended for his benefit, and that he accepts them if he cannot procure their nullity, or his recourse on the assignee for the amount of the adjudication. There are other allegations in the answer equally contradictory of each other, and the prayers present various demands responsive to the claims. That portion of the answer which directly applies to the plaintiff's demand against Macarty, denies that Delassus ever received any money from him, or remitted the same; wherefore he avers that the plaintiff has no claim as Delassus was never authorized to borrow money for him, or to remit him any, except such as he had collected from his debtors or tenants. The supplemental answer relates exclusively to the adjudication and title to the lots, and it is only necessary to say that it claims them on the ground that they were adjudicated to Delassus as agent for the defendant, and that he accepts them, and prays for a judgment.

In detailing the evidence, we have stated that it was admit-

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ted on the trial that Delassus would swear that he had full authority to sell the seven lots and stores. The fact of the plaintiff's believing the same thing, is proved to our satisfaction, and neither party was undeceived, until the notary carefully examined the power of attorney, and informed them of their error. Before this was done, the plaintiff had paid the \$7000 to Delassus, as the agent of Macarty. He acted under a full belief that he was the agent, and paid the money in good faith on account of what he believed to be a valid contract, which money was received by the defendant, or was applied to his benefit. This is a clear case of money paid and received in error. But as soon as the notary explained to the parties the actual authority conferred by the act of procuration, the position of things was changed, and the contract Delassus then made with the plaintiff, as to the two stores, was not as agent, but as a party acting for himself, in relation to a sale of property to which he had an apparent title, and which he claimed as his own, whether rightfully or not we shall not determine, until he is before us.

We now come to the only part of the case we propose to decide at present, except so far as our judgment shall open the question of the respective rights or claims of the parties to the title to the property and the mortgage thereon, which is to be hereafter settled, which is, can the plaintiff recover of Macarty the sum received by Delassus as his agent, and by him appropriated to his use? The equity of the demand is so clear, that we cannot hesitate in saying that the plaintiff ought to recover unless there is some positive law to prevent it. The counsel for the defence here, and the judge below say, that there is such a law, and they rely upon article 2134 of the Civil Code as protecting him from responsibility. That article says: "If the debtor give a thing in payment of his obligation, which he has no right to deliver, it does not discharge his obligation, and the owner of the thing given may reclaim it in the hands of the creditor, unless it be discharged by the payment of money, or the delivery of some of those things which are consumed in the use, and the creditor has used them, in which cases neither the money, nor thing consumed, can be reclaimed, and the payment will be good." This article we find under the head of payment

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or performance in general, which is a mode of extinguishing a conventional obligation. It therefore becomes necessary to examine the contract of mandate, and see whether it gives rise, at once, to the relation of debtor and creditor, in the same manner as other conventional contracts do. Pothier informs us, that it is of the class of contracts "*de beinfaissance*," regulated by the rules of natural justice. The mandatary is obliged by the contract, to render an account of his agency to his principal; and if he does not, it gives rise to the action *mandati directa*, on the part of the principal against the agent, in case he should, without just cause, fail in executing the mandate with which he is charged, in which action he is liable to be condemned to pay damages and interest for his unfaithful conduct." Pothier, *Contrat de Mandat*, Nos. 2, 3, 51, 61. Story, in his *Treatise on Agency*, section 203, says, it is the duty of the agent to keep regular accounts of all his transactions on behalf of his principal, and to render them at all reasonable times, and to pay over or deliver all the property and proceeds in his hands. It is the duty of the agent to keep the property of his principal separate from his own, and not to mix it; if he does, and afterwards he is unable to distinguish between the one and the other, the principal, as a penalty, has a right to take all. *Ib.* No. 205. Our Civil Code says, that the agent is responsible in damages for the non performance of his duty: he is bound to render an account of his management, and to restore to his principal whatever he has received by virtue of his procuration, even should he have received it unduly. Articles 2971, 2973, 2974. From these authorities, it seems to us that the law does not, by the contract of agency, establish at once the relation of debtor and creditor between the agent and principal. That the former may finally become a debtor, and the latter a creditor, is undeniable; but not, we suppose, until the dissolution of the contract, and the neglect or refusal of the agent to account and pay over the funds and property in his hands. Whilst the agency continues, the property and money in the hands of the agent belongs to the principal: the agent is a trustee, and if he disposes of the property improperly, the principal can recover it from the possessor. The procuration in favor of Delassus

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was not revoked, and he notified thereof, when he received the money from McDonough. It was not received by Delassus in his individual capacity, nor so paid to him by the plaintiff; but it was received as agent, on account of a contract which both parties believed he was authorized to make. Macarty had a right to receive the money, although unduly received by his agent; he did receive it; and when the error was discovered, he had no right to keep it, because his agent had not been faithful in other respects, and thus enrich himself at the expense of another. If Delassus had obtained this sum from the plaintiff in his own name, and had given it to Macarty, we should not pretend that he was responsible for it, unless the money had been stolen, or procured by a gross fraud, which is not alleged nor pretended. But such is not the case. The name and credit of Macarty was used by his agent in a manner in which he believed at the time that he was authorized to use it, for the purpose of getting the money. He received it by virtue of his procuration, and gave it to his principal, who must restore it. Article 2134 of the Civil Code is not, in our opinion, applicable to the case before us. Delassus did not give to Macarty a thing he had no right to deliver; on the contrary, what he gave he was bound, as his agent, to deliver; and, being proved to have been received and delivered through error, the money must be repaid. In his answer Macarty does not allege that Delassus was his debtor, nor that the money was received from him in discharge of an existing debt, although it was permitted to be shown at the trial, by Delassus' accounts, that he had received large sums as agent, which had not been accounted for, and that no remittance had been made for a considerable time.

We are not prepared to establish, as a general rule, that the relation of principal and agent, is that of creditor and debtor as soon as the latter receives money or property for the former. We regard it as something more: it is a trust; and the receipt of the money or property does not give the agent a title to it, which would be the case if he be regarded as a debtor alone.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that the plaintiff, John McDonogh, do recover of the defendant L. B. Macarty

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the sum of seven thousand dollars, with interest at the rate of five per cent per annum from the 23d day of June, 1843, the day of judicial demand, with costs in both courts; reserving to the plaintiff, to Delassus, McCarty, and the assignee of Walden, all their rights or title to and mortgage on the lots Nos. 58 and 59, and the stores thereon, whenever the same shall come up for trial, whatever said rights may be.

SAME CASE;—ON AN APPLICATION FOR A RE-HEARING.

An agent is a competent witness for his principal, in an action against the latter to recover a sum of money, alleged to have been paid to the agent through error, and admitted to have been paid by him to his principal. The witness is indifferent, being responsible to one or the other party for the amount in controversy.

L. Janin, for a re-hearing. The defendant Macarty left New Orleans in 1840, for France, and entrusted the management of his extensive property in this city, consisting of houses, money loaned on interest, &c. to Delassus, to whom he gave a notarial power of attorney. Among other things, this power of attorney authorized Delassus to buy, if offered at judicial sale, any property upon which his principal had a mortgage, but not to sell it again, nor to borrow money. By private instructions, Delassus was directed to send to Macarty \$8,000 a year, in semi-annual instalments. The evidence shows that Macarty's income greatly exceeded this amount.

Delassus proved an unfaithful agent. His accounts show that in November, 1842, he owed Macarty \$84,968 78. He was examined as a witness in the case, and stated under cross-examination, that since November, 1842, the amount of his debt had increased; that in April, 1843, nine months of the usual remittance were in arrears, and that he had appropriated to his private purposes every dollar of the balance which Macarty had in his hands.

Daniel T. Walden, a person on whose property Macarty had mortgages to the amount of \$56,000, went into bankruptcy in 1842. The property on which Macarty's mortgages bore, con-

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sisted of nine brick stores on New Levée and Commerce streets. Walden had also other stores of the same description and in the same vicinity: all were sold on the 14th of January, 1843, by the United States marshal, under an order of the court of Bankruptcy. At this sale Delassus bought eight of the mortgaged stores for Macarty, another was adjudicated to Jennings, but Delassus took the bid off his hands for Macarty. For the sake of entire correctness it ought to be stated, though it is immaterial for the present suit, that two of these stores were in reality adjudicated to Wm. A. Gasquet, but that, by consent of parties, the adjudication was changed to Macarty's name; the assignee made a sale of them to Delassus, as Macarty's agent, and he sold them immediately afterwards to Wm. A., and James A. Gasquet. This unauthorized sale has given rise to another suit now pending on appeal. The whole amount for which the nine stores were adjudicated was \$49,100. McDonogh was present at the marshal's sale, and bought four pieces of property, amounting to \$30,400.

McDonogh's petition, which was filed on the 23d of June, 1843, states, that on the 16th of April, 1843, Delassus, as Macarty's agent, agreed to sell him nine stores fronting on New Levée and Commerce streets, which Delassus alleged he had bought on account of L. B. Macarty, at the assignee's sale of D. T. Walden's estate; that this sale was to have been made for \$22,500, that is at the rate of \$2,500 each store; that Delassus afterwards represented to him that, upon examination, he found he had bought only seven, and not nine stores; and that, therefore, it was agreed that these seven stores should be sold for \$17,500, still at the rate of \$2,500 a store. It is, indeed, in evidence, that a notary was instructed by them to draw up such a bill of sale. Before it was completed, Delassus represented to McDonogh that he was in need of funds to make a remittance to Macarty, and requested him to advance \$7,000 on account of the contemplated sale. In consequence of this request, McDonogh paid him \$7,000, and took the receipt transcribed in the opinion of the court.

A few days after this, Cenas, the notary, while preparing the deed, examined the power of attorney from Macarty to Delas-

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sus, and finding that it did not contain the power to sell, informed McDonogh of it. This put an end to the projected negotiation. Delassus then said that he could pass a sale of at least two of the stores, as they were in his own name. These were stores No. 58 and 59 on New Levée street. One of them had been adjudicated at the assignee's sale to Macarty, but Delassus had desired the assignee to make the sale to Madame Lalaurie, whose power of attorney he also held. The other store had been adjudicated to Jennings, but as already stated, he had surrendered the adjudication to Delassus, for Macarty. Macarty's mortgage bore on both these stores. At the renewed request of Delassus, Walden's assignee consented to disregard the sale to Mme. Lalaurie and the adjudication to Jennings, and to pass the sale to Delassus. The assignee states in his testimony, that it is customary, after such adjudications, to change the name of the bidder, if all the parties agree to it. This done, the notary proceeded to make out the sale of the two stores by Delassus, in his individual name, to McDonogh. The sale was prepared; the price, however, of which the notary had not been informed, was yet left in blank, when both McDonogh and Delassus went into the office of the notary and signed the act. After the signature, Delassus stepped to the fire place and warmed himself; McDonogh approached the notary's clerk and said, "Fill up the blank with \$5,000," and this was accordingly done. Let it be remembered, that on the 14th of January, 1843, they were adjudicated at \$13,650. Delassus shortly afterwards left the office, and the next day he returned, and, looking at the act, observed that the price agreed upon was \$5,000 for each of the stores, and not, as the act stated, \$5,000 for both: he also said, that he had not heard the directions given by McDonogh to the notary's clerk, after the signature of the act. The notary and the clerk, without being positive, believe that Delassus might have heard McDonogh's directions. However this may be, Delassus refused to permit his wife to sign the renunciation in the sale which had been prepared for her, and to deliver up the stores, and they were afterwards taken possession of by Macarty's new agent. McDonogh then brought this suit, on June 23d, 1843, before Macarty's return from Europe. He

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prayed that both Delassus and Macarty might be cited; that the stores might be sequestrated; that he might be declared to be the owner of these stores; that Delassus might be ordered to authorize his wife to sign the renunciation; and that, if it should be held that he had not a good title to the stores, Macarty might at least be ordered to refund to him the \$7,000, which he had paid to Delassus on the 18th of April. This is an accurate summary of the prayer of the petition, to which we shall have occasion to revert.

A judgment by default was taken against Delassus, but not confirmed. Macarty filed an answer and a supplemental answer. The case was tried, and the District Court decided that McDonogh had no title to the lots, and could not even recover the \$7,000.

The Supreme Court now holds that Macarty must refund to McDonogh the \$7,000, refuses to decide on the title to the two stores, and reserves to Macarty, McDonogh and Delassus, "all their right or title to, and mortgage on the lots Nos. 58 and 59, and the stores thereon, when the same shall come up for trial, whatever said rights may be."

This decision is contrary to the prayer of the plaintiff, and contrary to the nature of this suit. Under no circumstances can McDonogh recover the \$7,000, unless it has first been decided that he has no title to the property on account of which he paid it. This seems to be obvious beyond argument. Consistently with its present opinion, the court should have decided at the same time, that McDonogh had no title to the lots, for if the sale is good, the payment is good. The defendant Macarty should not be exposed to the trouble, risk and expense of a second suit involving the title.

We now beg leave to state what, in our opinion, the judgment of the court should be, under the pleadings and the evidence of the case.

The pleadings of the plaintiff have already been mentioned; those of the defendant, Macarty, were drawn up in the alternative, in order to meet the facts, as they might in the sequel be disclosed. When the first answer was filed, Macarty was still in Europe, and his representatives were as yet, and professed

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themselves, quite ignorant of what had happened between Delassus and McDonogh, the assignee, the notary, &c. Nor had they time for tracing up the devious and intricate course of these dealings, for McDonogh had commenced by sequestering the stores in their hands. Unless they gave bond within ten days, McDonogh would have had the right, under the act of March 5th, 1842 (p. 204), to bond them himself, and claim possession of the stores. They did not, nay they could not know, whether the real state of the facts was of such a nature as to make it safe to claim title in Macarty's name. They therefore considered it necessary to file an answer at the same time as the bond, in order to explain the ground upon which they claimed the right of bonding, and to prevent misconstruction; and thus they were enabled to state in substance, that although they yet were ignorant whether Macarty had a title to, or only a mortgage on these lots, still he had an interest in them, in one or the other capacity; wherefore they insisted on provisionally retaining possession thereof, promising to account for the rents, if the court should hold that Macarty was not the owner. This answer was filed on the last of the ten days, a delay which was insufficient to enable them to ascertain all the circumstances which appeared on the trial, of some of which they indeed then heard for the first time.

Under these circumstances the answer assumed several hypotheses, and alleged :

1. That the lots were adjudicated to Mme. Lalaurie and Jennings, and that the transfer of the adjudication to Delassus could not impair Macarty's rights as a mortgage creditor.

2. That if it should be held that the transfer of the adjudication to Delassus, vested in him personally a title, the sale was void, and the property should be returned to the bankrupt estate, because an agent cannot buy at auction the property, the sale of which he is directed to procure. 18 Duranton, No. 206.

3. That if Delassus intended to buy the property for his own account, and the assignee permitted him to pay for it by a release of Macarty's mortgage, and thus enabled him to resell it free of mortgage, the assignee was responsible to the defendant Macarty, for the amount of the adjudication. For an agent cannot

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give a release to himself in the name of his principal. *Beal v. McKernian*, 6 La. 407.

4. That if it should appear that Delassus, although he bought the property in his own name, intended to take it for Macarty's account, and that this form of the sale could commit the rights of Macarty to the property, and enable McDonogh to obtain rights to it, then the defendant Macarty, repudiated the adjudication, because he had authorized Delassus to buy in certain property in his (Macarty's) name, but not otherwise.

5. That even if the form of the assignee's sale could vest rights in a *bona fide* purchaser, to Macarty's detriment, still it could not benefit McDonogh, who knew that Delassus was throughout dealing as Macarty's agent, and who surreptitiously obtained a sale of the two lots for \$5000, well knowing that three months previously they had been sold at public auction for \$13,650, which amount they are fully worth.

6. That if the adjudication to Delassus could enure to the benefit of Macarty, without giving any rights to McDonogh, the defendant Macarty was willing to abide by it.

7. That whether it should be held that he, Macarty, had a title, or not, it was clear that McDonogh had none, and that as to McDonogh he had a right to retain the possession of the stores, and provisionally to receive the rents thereof.

8. That the receipt of the \$7000 by Delassus, being unwarranted, inasmuch as Delassus had no power either to sell the property or to borrow money, Macarty was not bound by it, nor responsible for the amount.

9. And, finally, the answer prayed for general relief.

Afterwards Macarty filed a supplemental answer, which states "that the transactions mentioned in the original answer took place during the respondent's absence from this State, and without his knowledge; that when it became necessary to file an answer in the suit, your respondent was still not fully informed of the occurrences connected therewith, and that in consequence thereof said original answer contains several omissions and inaccuracies." The supplemental answer then proceeds to state that lot No. 58 had originally been adjudicated to Delassus for, and in the name of the defendant Macarty; that

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thereby a title was vested in him, which Delassus' subsequent agreement with the assignee to transfer the adjudication to Madame Lalaurie, could not divest ; and that he therefore claimed the ownership of that lot. And finally the answer stated, as another reason of the nullity of the assignee's sale to Delassus, that it had not been recorded in the office of conveyances.

At the trial, it further appeared that Jennings, to whom lot No. 59 had been adjudicated, had transferred his bid to Delassus for *Macarty*. This agrees with Delassus' first statement to McDonogh, for he proposed to sell this property as Macarty's agent, and it was only after the notary had informed McDonogh, that Delassus had no right to sell, that Delassus took this property in his own name.

Upon these pleadings, the District Court decided :

1. That the original adjudication of lot No. 58, in Macarty's name, vested a title in him. Civ. Code, art. 2586, 2595, and the late case of the *Succession of P. N. Boudousquie*, 9 Robinson, 405.

2. That the adjudication of lot No. 59, to Jennings, and Delassus' agreement with Jennings to take the bid for Macarty's account, also vested a title in Macarty, Delassus being authorized to buy such property.

3. That a title thus vested in Macarty could not be divested by any act of Delassus, who was not authorized to sell. Least of all could he make a transfer of the adjudication to himself.

4. That although Macarty had received \$6000 of the money paid by McDonogh to Delassus, still as Delassus was indebted to him in a large amount, and Macarty was not informed of the origin of this money, but evidently must have supposed that it was a remittance on account of what Delassus owed him ; and as furthermore it was admitted that Macarty had immediately employed this money in the payment of debts and traveling expenses, he could not be called upon to refund it. Civil Code, 2134.

The court has been pleased to find that these pleadings are "irrelevant and contradictory," and that they have betrayed the District Court into the confusion which its judgment exhibits, by deciding on the title, which was only in issue with Delassus.

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But it is submitted that the title was at issue with Macarty. The petition was indeed drawn up under the belief that Delassus claimed to be the owner of the lots, and had them in his possession, but it is directed against both Delassus and Macarty, and the plaintiff prays generally to be recognized as the owner of the lots. This is a petitory action which can only be directed against the possessor of the property. The lots were in Macarty's possession at the time of the institution of the suit, they were sequestered in his hands and bonded by him, and he claims title to them in his answer, under a certain state of facts, which the evidence has since shown to be the true one. Both in the inferior and the Supreme Court, the parties tried this issue of title, and it seems certain that if the court did decide that McDonogh's title is good, Macarty could not contend that this was not *res judicata* as to him, on the ground the judgment by default against Delassus had not been made final. Thus the matter was viewed by the plaintiff himself. The petition says: "If it is to be decided that the said sale is to be rescinded, then the petitioner is entitled to a judgment against said Macarty for the sum of \$7000," &c. And the prayer of the petition asks: "In case the court should decide that the title of the petitioner is not valid and ought not to be executed, and that an unincumbered title is not given, then that judgment may be given against said L. B. Macarty for \$7000," &c.

Hence, it follows, that if the title is not at issue, the appeal must be dismissed, there being nothing before the court.

But it is again submitted that the title is at issue, and ought to be adjudicated upon by the court.

As to the last point of the case, the only one decided by this court, viz., McDonogh's claim for the reimbursement of the \$7,000 paid by him, on the 18th of April, 1843, to Delassus. It appears in evidence, that in the beginning of 1843, Macarty, who had then long been without his usual remittances, and suspected that his affairs had been mismanaged by Delassus, sent his nephew, Paulin Blanque, from Europe to New Orleans, with directions to look into his affairs, and to urge Delassus to make remittances, of which Macarty was in the most pressing want. Delassus refused to render an account to any one but

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Macarty himself, but admitted that he was largely in Macarty's debt. He also promised constantly to make remittances, and at last, in April, handed to P. Blanque, two bills of exchange to Macarty's order, to be sent to Macarty, without telling Blanque from what source he got the money. These bills were received by Macarty in Europe. It is admitted that he immediately spent their proceeds, in the payment of debts, &c. At the trial of the suit, Delassus was called as a witness by the plaintiff. He stated that, by his own accounts, he owed Macarty, in November, 1842, \$84,068 72; that since then his debt had increased; that when he received the \$7,000 from McDonogh, he had no money of Macarty's on hand, the meaning of which is, that he had spent it all for his personal wants and private affairs; that he had employed \$6,000 out of the \$7,000 he had received from McDonogh, in the purchase of the two bills of exchange alluded to, and \$973 or \$975 of the remaining \$1,000 in the payment of a note for which Macarty was responsible. There is no evidence whatever of the \$7,000 except Delassus'—if that is rejected, this part of the case fails. All the testimony was received subject to all legal exceptions. We have therefore a right to object to the testimony, relating to the note of \$973 or \$975. This must be produced or accounted for; better, clearer, more tangible and examinable testimony must be produced of such a fact. Besides this general reservation, a special bill of exceptions was taken to the admission of Delassus as a witness, on the ground that he is interested and a party to the suit. That not even a nominal party to a suit can be examined as a witness, has been decided in *Stein v. Bowman*, 13 Peters, 209. Delassus' interest is a moral one, which may impeach his testimony though not render it inadmissible, and a pecuniary one for costs. The latter is undoubted. The plaintiff prays that Delassus may be ordered to perfect the title, and that, in case it should be held that he has not a good title, Macarty may be condemned to pay him \$7,000. If the plaintiff obtains a judgment on the first branch of his demand, Delassus has to pay the costs; if on the second branch, Delassus pays no costs, and they fall on Macarty alone. That a responsibility for the payment of costs renders a witness inadmissible, is an elementary principle.

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But in case Delassus' testimony could be admitted, Macarty is protected by art. 2134 of the Civil Code. The court, however, makes a distinction between an agent who is in debt to his principal and another debtor, and by this distinction takes Macarty out of the rule.

Macarty did not allege in his answer that the money was received in discharge of a previous debt, because he did not know it, and, until the moment of the trial, he had not even a suspicion that it would be attempted to prove that he had McDonogh's money.

That plausible and specious arguments may be made in favor of the position of McDonogh's counsel, cannot be denied; they are never wanting in the infinite number of cases in which two innocent parties endeavor to throw upon one another, the loss occasioned by the fraud, or fault of a third party. But the law puts limits to such generalities; unwilling to leave every thing to judicial discretion, unable to provide for every shade of incidents, it furnishes rules for this class of cases, framed to work best in the greater number of instances. Occasional individual hardship is a less serious evil than universal uncertainty. One of these rules is that contained in art. 2134, which has stood the sanction of ages, having been transmitted from the Roman to the French, Spanish, and our own laws. It is certainly a hard case that A., whose money has been taken to pay a debt due to B., should not be permitted, with full proof of the fact, to claim it from B. B. undoubtedly was enriched at the expense of A. But it would be infinitely worse if money could be followed from hand, through a chain of titles, like a tract of land. "L'équité," says Bigot-Préameneu on the corresponding art. of the French Code (1238), "ne permet pas que le créancier qui l'a consommée de bonne foi puisse être inquiété. Ce serait une révendication, et il ne pent y en avoir que contre le possesseur de mauvaise foi, ou contre celui qui par fraude a cessé de posséder." See also 11 Toullier, 129. 12 Duranton, 48, 48. Dig. Lib. 46, Tit. 3 (de Solut) l. 78. The distinction admitted by the court would deprive the infinitely important and numerous transactions between principal and agent of the protection of a vital law. Art. 2134 applies only to a payment made

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by a debtor to his creditor, and the court holds that an agent is not a debtor in the sense of this article, "until the dissolution of the contract of agency, and the neglect, or refusal of the agent to account and pay over the funds and property in his hands." We submit that *perhaps* an agent becomes a debtor, as soon as he receives property of his principal for which he is accountable, and that he certainly is a debtor from the moment he mixes the principal's funds with his own. If, for instance, a commission merchant deposits all the funds of his customers in bank, in his own name, and the bank breaks, can he, as a depositary might, relieve himself by returning the worthless paper, or is he not responsible for the loss? *A fortiori* is the agent a debtor, when, like Delassus, he refuses to account, admits his indebtedness, and states, under oath, that he has spent his principal's money. He is so much a debtor that the law calls him a defaulter, and condemns him to pay interest, without being put *in mora*. "The attorney is answerable for the interest of any sum of money he has employed to his own use, from the time he has so employed it; and for that of any sum remaining in his hands, from the day he becomes a defaulter by delaying to pay it over." Civil Code, art. 2984. The law favors a *bona fide* payment made to a creditor, because he has a reasonable ground to expect a payment from his debtor. And who has better reasons to count upon payment than the principal from his agent? The broad statement of the court amounts, in practice, to this, that if one who is the agent both of A. and B., should take the money of A., and repay, with it, funds placed in his hands by B., A. can recover it from B., at any time, although B. should have received and consumed it in good faith. It would be easy to cite numerous instances of daily occurrence where infinite mischief and confusion would result from the distinction now, for the first time, sanctioned by this, or, it is believed, by any other court. The evil of this decision would be but little diminished by the further distinction that an agent would be viewed like another debtor, after the revocation or the expiration of the power of attorney. By far the greater number of payments are made by agents during the continuance of their agency.

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It is true that farther on, the court says that Macarty must be responsible for the money, because Delassus gave the receipt in his (Macarty's) name. "If," says the court, "Delassus had obtained this sum from the plaintiff in his own name, and had given it to Macarty, we should not pretend that he was responsible for it, unless the money had been stolen, or procured by a gross fraud, which is not alleged, nor pretended." This is in direct contradiction of the important part of the decision immediately preceding it and just commented on. There the court said that in order to take a payment out of the rule of art. 2134, it was sufficient that the relation of principal and agent had not ceased, because, until then, the agent could not be called a debtor. And the meaning of the passage now under review is, that if the agent receives A.'s money in his own name, and pay it to his principal, B., the payment will be good, although the relation of principal and agent has not ceased. This must then be because the agent, although an agent, is yet a debtor, in the sense of art. 2134. Let us recur to the text of the article.

"If the debtor give a thing in payment of his obligation, which he has no right to deliver, it does not discharge his obligation, and the owner of the thing given may reclaim it in the hands of the creditor, unless it be discharged by the payment of money, or the delivery of some of those things which are consumed in the use, and the creditor has used them, in which cases neither the money, nor the things consumed can be reclaimed, and the payment will be good."

The inquiries to which the application of this article gives rise, are: 1st. Is the paying party a debtor? 2d. Is the receiving party his creditor? 3d. Had the debtor a right to deliver the thing which he gave in payment? 4th. Was the payment made in money, &c.? The first of these questions, is decided by the court in two opposite ways.

The 2nd and 4th of the above questions are of no interest in this suit, but the 3d must detain us a moment. Had Delassus a right to deliver McDonogh's money? Assuredly not, because it did not belong to Macarty. Here the court comes to a different conclusion for which it relies on art. 2074. "He" (the attorney in fact) "is bound to restore to his principal whatever

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he has received by virtue of his procuration, even should he have received it unduly." Delassus, says the court, received the money by virtue of his procuration. We submit that he received it in opposition—in violation of his procuration. He received it for the price of Macarty's property, which he had no right to sell. An attorney would receive by virtue of his procuration, though unduly, if, charged with the collection of debts, he extorted more from the debtor of his principal than was really due; if, being authorized to sell, but having private instructions not to sell, he nevertheless made a sale; if, having the power to borrow, he borrowed without necessity. Acting in virtue of a power of attorney means acting under and in obedience to it, doing something that it permits, and therefore representing the principal. It is because in these acts he represents the principal, that he must transmit what he has received. But the attorney who does something which he is not authorized to do, does not represent and bind the principal, whether he use his name, or not. Story's Agency No. 156. 18 Duranton p. 228, No. 332. He no more acts by virtue of his power of attorney, than he who pretends to have a procuration, and never received any whatever from the principal. Both are equally pretenders. Acting by virtue of a power of attorney, would be construed by the court into meaning the same thing as acting under the pretence of one. But the best proof that such a payment as was made by McDonogh to Delassus, was not one of those to be transmitted to the principal, according to art. 2974, is this, that if it became, after the transmission of the money to Macarty, equivalent to a payment to Macarty, Macarty would at once be considered as having ratified the illegal sale, a conclusion so obviously wrong that the premises which lead to it cannot be right. Macarty could not have claimed the money from Delassus without having ratified the sale. How could then Delassus be bound to transmit it to him, without first knowing whether Macarty would approve the sale? The real, or pretended ignorance of Delassus of the contents of his power of attorney, cannot possibly make the least difference, and deserves not be discussed; this belief could not affect the question of ownership. Art. 2134 makes the question dependant upon the

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fact, not upon the belief of the fact. It is indeed a startling and indefensible proposition that the writing of such an attorney, nay his simple belief in matters beyond his authority, without the knowledge, or approbation of the principal, should be suffered to produce any effect whatever.

It is also worthy of note, that neither the court, nor the plaintiff's able counsel, adduce the least authority in support of the distinctions which they make while construing articles 2134 and 2974. The equity of this case is with Macarty. Was McDonogh indeed the innocent unsuspecting purchaser that he represents himself to be? Let us review his conduct. He is present, and a large purchaser at the bankrupt sale at which the nine stores mortgaged to Macarty are adjudicated for \$49,100. These he agrees to purchase, three months afterwards, for \$22,500. Macarty's large and unincumbered fortune was well known to him; so was the value of the property, as fully equal to the amount of the adjudication. Should he therefore not have suspected foul play? Could it have escaped his penetration that this was the closing attempt of an unfaithful agent, knowing that he would soon be deprived of the power of increasing the losses of his principal, and determined therefore to make one large, last, final haul? And after two of the nine stores are sold to the Gasquets, and Delassus has also received, and appropriated to himself their proceeds, McDonogh makes another agreement to take the remaining seven stores, which cost \$37,150 for \$17,500. And when this sale fails, he insists upon claiming two houses, which cost \$13,650, for \$5,000! Thus far goes the evidence; the remainder are conjectures, in forming which the court needs no assistance. McDonogh was at least guilty of singular negligence in not examining the power of attorney sooner, nor can this be explained in any other manner, than by his eagerness to make an unconscionable bargain at Macarty's expense. Macarty, on the other hand, had placed on record a power of attorney drawn up with much care and precision; he had used every necessary precaution for the protection of those who might have business with him during his absence.

GARLAND, J. The complaint of the counsel of the applicant

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for a re-hearing is two-fold: *first*, that we have not decided in his favor one part of the case, upon which we gave no opinion at all, because the rights of other persons than those before us were involved, and they had not been heard in the court below; and, *secondly*, he complains, that what we did decide is erroneous. The purport of the argument submitted is, to prove that what has been decided is inconsistent with that which has not been acted on at all. The counsel has possibly satisfied himself that he has discovered errors in the opinion of the court, which he endeavors to make appear, in, we believe, nearly every case that is decided adversely to him; but it does not follow that those errors are so apparent to others, who do not look at the case through the same medium, and endeavor to see both sides of it.

One object of the petition is, if possible, to draw from the court an opinion upon a part of the case which we said we would not decide, as it was now presented to us, and we see nothing in the reasoning of the counsel to induce us to change that determination.

Upon that part of the case which we did decide, the counsel has not favored us with a single authority or argument that was not considered before we came to the conclusions we have arrived at. There is nothing alleged to affect, in any manner, the positive provision of the Civil Code, which says, that the agent is bound to give to his principal whatever he has received by virtue of his procuration, even should he have received it unduly. It is not denied, and it is undeniable, for it was, in effect, admitted on the trial, that Delassus, at the time he received the sum of \$7000 from the plaintiff, really believed that he had authority to sell the property; and there is no doubt that the plaintiff, at the time, also believed it. The power of attorney gave Delassus authority to sell a large amount of real estate, which power was probably exercised, and induced a belief that he had authority to sell that on account of which the money was received. It is well settled, that an agent can only contract within the limits of his authority; but it is equally true, that his conduct and dealings with others, on behalf of his principal, are evidence from which an authority may be inferred.

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Delassus was here, with an authority to administer generally a large estate, real and personal, and with special power to sell a number of houses and lots, and also to purchase real estate, under certain circumstances. He is seen at a public sale exercising a part of his authority, to wit, the power to purchase. He really believed that he had also the power to sell the same property, under the clause of the procuration authorizing him to sell, and so informs the plaintiff, who believes it, contracts with him, advances money on the faith of the contract, which goes directly into the pockets of the defendant Macarty, and when the error is discovered, the latter says that he is not bound to refund it, because it has been expended, and his agent, having been unfaithful in other respects, has become thereby his debtor.

The more the evidence in this case is examined, the more apparent does the error, under which the parties acted, become. The money received by Delassus, as agent of the defendant Macarty, was never mingled with his own funds, according to the testimony of Pellerin, Nathan, and his own; but was invested at once in bills of exchange to the amount of \$6,000, which were remitted to the defendant Macarty, by Blanque, and the balance disposed of in paying a debt for which Macarty was responsible. The sum received was given to the principal, and being unduly received, as we have before said, must be restored.

The counsel has further urged, that Delassus was not a competent witness, and now insists on a bill of exceptions which he took to his being admitted as such, which he alleges he urged in the argument. We have no recollection of that fact, no note having been preserved of the point; but we are willing to admit that he did, as he so states, and have considered the bill.

As a general rule, an agent is a competent witness in suits in favor of or against the principal. There may be exceptions to the rule; but we do not think that Delassus comes within any of them, in this case. As between the plaintiff and defendant Macarty, we do not see such an interest, for or against either party, as should exclude the testimony of the witness. If the plaintiff had not succeeded in this case, it is quite probable that Delassus would be responsible to him for the money received;

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but as he obtains a judgment, then the amount which the defendant Macarty alleges that the witness is answerable to him for is increased by the sum of \$7000, so that the witness stands responsible to one party or the other. His ultimate responsibility for costs on the demand alleged against him, does not, in our opinion, exclude him as between the other parties in the case. The re-hearing is refused.

BENJAMIN WILLIAMS and others, Heirs of Joseph H. Williams, deceased, v. NAPOLEON BONAPARTE RIDDLE.

10	506
51	350

To recover, in a petitory action, against a party in possession claiming title, the plaintiff must not only show a better title than the defendant's, but a title as good as any which the latter can oppose to him, whether vested in the defendant or not. But the outstanding title in such third person must be a legal, subsisting, and better title than the plaintiff's; and, in fairness, should be set forth in the answer, that the plaintiff may have notice thereof.

APPEAL from the District Court of West Feliciana, *Butler, J.*

GARLAND, J. The plaintiffs assert that they are the owners and legal proprietors of a tract of land containing two hundred and seventy-five *arpents*, lying on the east fork of Grant's bayou, about half a league west of Thompson's creek, with certain boundaries as mentioned in a plat of survey made by Ira C. Kneeland in the year 1810. They claim it by virtue of several conveyances, as a part of a tract of one thousand superficial *arpents* granted and patented to Don Pedro Robin Delogny, by Governor M. Gayoso, on the 16th day of January, in the year 1799. On the 14th of November, 1820, Delogny, by his agent Labarte, sold to Samuel S. Crocker and Isaac Johnson, all that remained of a tract of land which he had in the parish of Feliciana, bounded in part by the Mississippi river and Thompson's creek, which contained, after deducting about one hundred and sixty superficial *arpents*, previously sold to others, about three thousand one hundred and sixteen superficial *arpents*; the portion sold being divided into two lots, represented on a plat annexed to the sale by the letters A and B, and a red line en-

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closing the whole. A portion of the tract of one thousand *arpents*, granted as aforesaid, is included within the red lines on the plat A, and all that part of it claimed by the plaintiff. No boundaries are specified in the sale, but on the plat they are plainly represented; and on the east, the land claimed is represented as bounded by the claim of Felix Bernard, under whom the defendant holds. On the 10th day of January, 1823, Crocker, by an authentic act, sold to his co-proprietor Johnson, his "joint and undivided half of all the land, purchased by said Crocker and Johnson from P. R. Delogny, now remaining unsold, and by them held as joint property." There is not in this act any specification or statement of boundaries, or quantity sold previously, or then sold. At a probate sale of the property of Isaac Johnson, made in December, 1824, Joseph H. Williams, under whom the plaintiffs claim as heirs, became the purchaser of "one tract of land containing two hundred and seventy-five *arpents*, more or less, being lot No. 14." This is the only description of the land in the *procès-verbal*, and no other act is shown that gives a further description of it.

The defendant answers by a general denial, and an allegation that he purchased the land at the probate sale of James P. Hearsey, with a general warranty of title. He prayed that the widow and heirs of Hearsey might be cited; and he further pleaded the prescription of ten years. The legal representative of Hearsey's heirs, after a general denial of any personal responsibility, having accepted the succession with the benefit of inventory, and the widow having renounced the community, further say, that the land claimed by the plaintiffs does not comprise any portion of that sold to Riddle at the sale of the deceased, and that he has not been disturbed in the possession or enjoyment of that which he really purchased.

Although neither the defendant nor his warrantors, in their answers, set up any particular title in themselves, they were permitted, without objection on that ground, to offer evidence of one, and first offered a certified copy from a book filed and deposited in the office of the Register of the Land-Office in New Orleans, entitled, "*Registro de los primeros decretos de concesiones de tierra*"—Register of the first decrees or orders of con-

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essions of land—from which it appears, that, on the 15th of December, 1786, a concession of eight *arpents* front of land, with the ordinary depth, was, made to Felix Bernard, on the bayou New Feliciana, about one league from the river, bounded by the lands of Edmund Piper and Lewis Alston. This claim was surveyed and located, in 1787, by Carlos Trudeau, surveyor of the province, with its front on the river Feliciana, commonly known, at that time, as the "*Bayou de los Ecores*," and now as Thompson's creek, and the rear line at the extremity of the lands fronting on the river Mississippi. The boundaries are fixed, the proprietors above and below named, the length and courses of the lines stated, and the superficial quantity of 236 2-5 *arpents* mentioned; and on the 18th of June, 1787, a patent in form was given by Governor Miro, conforming in every respect to the survey. On the 28th day of July, 1812, Zachariah Smith, of Wilkinson county, Mississippi, by an act under private signature sold to Adolphus Frederick Smith, of Attakapas, the above described tract of land. In the deed, it is stated, that the land was granted to Felix Bernard, and the vendor says that he purchased it of Edward Gibbons, as a reference to the Spanish records will show. On the 8th of January, 1819, Adolphus F. Smith, by public act before the judge of the parish of Feliciana, sold the same tract of land to John Rhea, who, under the act of Congress of May 4th, 1826, entitled, "An act supplementary to the several acts for ascertaining titles and claims to land in the St. Helena and Jackson Court-house Land Districts," presented the same to the register and receiver at St. Helena, for confirmation, and they certify that he is confirmed, and entitled to the land under Felix Bernard, the original grantee.

On the 6th of January, 1834, Rhea, by an authentic act, sold to Hearsey, *according to the plat annexed to the grant from the Spanish government*, a tract of land of eight *arpents* front on Thompson's creek, running back between parallel lines to meet the rear lines of the grants, fronting on the Mississippi, being the same lands granted to Don Felix Bernard, containing 236 2-5 *arpents*; but he only warranted the title to 153 *arpents*, fronting on the creek; and at the probate sale of Hearsey's es-

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tate, the defendant, Riddle, purchased. It is thus shown, that the plaintiffs claim under a Spanish patent to Delogny, dated in 1799, and the defendants under one to Felix Bernard, dated in 1787, for different tracts of land, which from the plats of survey accompanying each of the patents, do not appear to conflict in any manner. On the contrary, the title to and plat of Delogny calls to be bounded on Zachariah Smith's tract, which an examination of the plat annexed to the sale from Delogny to Crocker and Johnson, and the plat of Kneeland, made in 1810, shows to be the same tract granted to Felix Bernard.

The land in controversy, the plaintiffs allege, forms part of what the witnesses call "the Pinchey tract;" and a witness named Rucker, says that he had known it about ten years previously to [May, 1844; that it was then in the possession of Rhea, under whom the defendant holds as vendee of Hearsey. Rhea always claimed it, but neither he nor Hearsey lived on it, but on the Bernard tract, though the latter cultivated it. Kemperling testifies to the Bernard tract being occupied for more than fifty years. The grantee first occupied it, then Gibbons, and he believes Adolphus F. Smith was on it for a time, he being the son-in-law of Gibbons. Rhea never personally occupied the premises. Joseph H. Williams, under whom the plaintiffs claim, first cleared a field on the "*Pinchey tract*," but his houses were on the land granted to Lewis Alston. He says that if the full quantity be allowed to the grant to Bernard, then the field is on that tract; but if not, then it is on the "Pinchey tract;" that he knows the side lines of the Bernard claim, and, as he understands them, Williams opened the field on it. He was on it in 1812, or 1818. He says it was generally understood when the "Pinchey tract" was surveyed, that the quantity was made out "by shifty surveying." Bates, the parish surveyor, who made a survey under the order of the court, says, that the tracts of land fronting on the Mississippi can all have their full compliment or quantity, without touching the Bernard tract at all; that it is fully three miles from its back line to the river. He says, that if he was called on to locate the Bernard and Delogny tracts, he would first run out the first named grant, giving it the full quantity. He proceeds to de-

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tail his operations on the ground, which it is not necessary to state in detail; but he shows, that if the line claimed by the plaintiffs be assumed as correct, then there is an interference.

The court below was of opinion, that the plaintiffs had made out a regular chain of title from Pedro Robin Delogny to their ancestor; that it was not shown that the defendant, or his warrantors, were invested with the title in favor of Felix Bernard; and that prescription could not be based on the sale from Adolphus F. Smith to Rhea, made in 1819, because no actual residence on the premises was proved, nor did the certificate of confirmation from the United States to him give any title, as it enured to the benefit of Felix Bernard or his heirs, and that, therefore, the defendant had no title; a judgment was rendered against him for the land claimed, and in his favor against the warrantors for the sum of \$500, the value of the land, from which judgment the said warrantors have appealed, and made the plaintiffs, and the defendant, Riddle, appellees.

That the Spanish Governor of Louisiana, in January, 1799, conceded, by a complete title, to Pedro Robin Delogny, a tract of land fronting on the Mississippi river of one thousand superficial *arpents*, with specified bounderies, as shown by the patent and survey accompanying it, is unquestionable. The plat and patent both call for the line of Zachariah Smith among others. The other evidence in the record, to wit, the plat made by Kneeland in 1810, and the plat annexed to the sale from Delogny to Crocker and Johnson, show conclusively, that the tract represented on Delogny's Spanish plat, as being Zachariah Smith's, is the identical tract granted to Felix Bernard, twelve years before. The plat by which Delogny sold calls for Bernard's line. After this sale, every thing is left uncertain. It is not shown how much of the land purchased from Delogny was sold by Crocker and Johnson, previous to the sale from the former to the latter of his remaining interest, nor what quantity was transferred by the sale, nor is it shown how much Johnson sold previous to his death. At the sale of his succession two hundred and fifty-four *arpents* were sold to Jos. E. Johnson; two hundred and seventy-five *arpents* to the ancestor of the plaintiffs; and eight hundred *arpents* of swamp land to John Stirling. There

is no specification of the boundaries of these tracts, nor reference to any plat of survey to show in what part of the larger tract they are situated. The quantity sold is all that is stated, and that quantity is much less than the original tract. The plaintiffs allege that the land claimed by them is a part of the one thousand *arpents* granted to Delogny; but the immediate sale to them does not say so, nor can it be inferred from the act of sale to Crocker and Johnson, nor from that of the former to the latter. The plat made by Kneeland, is no where referred to in any of these transactions. In this respect, the case is very similar to that of *Hemken v. Britton*,* decided in October last, in the western district, in which we held that the plaintiff could not recover in consequence of the vagueness and uncertainty of his title.

But assuming the title of the plaintiffs to be certain and regular from the original grantee, as held by the court below, let us see if the judgment can be sustained. The evidence proves beyond a doubt, that the boundary of Zachariah Smith, called for in Delogny's patent and survey, is that of Felix Bernard, whose patent and survey are twelve years older, accompanied by possession and cultivation for many years—more than half a century—whilst there is no evidence of any one ever residing on and cultivating that part of the Delogny tract claimed by the plaintiffs, until their ancestor purchased from Johnson's estate, in the year 1824. It has been long settled by this court, that a plaintiff in a petitory action must, to recover against a party in possession, claiming title also, not only show a better title than the defendant has, but must show a title as good as any the defendant can oppose to him, whether it be vested in him or not. 3 Robinson, 206. In the case referred to, and in others, we have said that the outstanding title must be a legal, subsisting one, and a better one than plaintiff's to protect the defendant, and we have on various occasions intimated that, in fairness, it should be stated in the answer, so as to give the plaintiff notice, that he may prepare to meet it. In this case, if the counsel for the

*This case had not become final at the period of the adjournment of the court in October.

plaintiffs had objected to the reception of any evidence going to show a title in the defendant, or an outstanding one in some other person, on the ground of none such being alleged in the answer, it is possible that the evidence might have been excluded; but no such objection was made, and the evidence is before us to be acted on. The title to Felix Bernard is a Spanish patent, equal in dignity to that to Delogny. The plat of survey by Trudeau is as precise and specific in the one case as in the other, and Bernard's patent and plat are nearly twelve years the oldest, supported by direct evidence of occupation and cultivation before Delogny's grant was made at all. There is then a legal, subsisting and better title than that the plaintiffs claim under, in Bernard, or his heirs or assigns, and it must have its full quantity of 236 2-5 *arpents* in preference to the younger title, if it does not interfere with the tracts of land fronting on the Mississippi river. If the statement of Bates be correct, there is no danger of interference, as there is a sufficiency of land to give both patents their full quantity. The defendant is, therefore, protected from eviction by this title, although it may not be legally vested in him.

Upon the principles settled in the case of *Thomas and others v. Turnley* (3 Robinson, 206), and in the case of *Kirby's Heirs v. Fogleman* (16 La. 277), it would not be difficult to prove that the court below mistook the force and effect of the certificate of confirmation to Rhea, given by the Register and Receiver of the Land Office at St. Helena; but it is not necessary to go into that question, as, on the grounds stated, we are of opinion that the plaintiffs cannot recover.

The view we have taken of this case makes it unnecessary to decide upon the various bills of exception taken by the plaintiffs, as we have come to our conclusions upon evidence not objected to by them.

It is ordered, adjudged and decreed, that the judgment of the District Court be annulled, and reversed; and ours is in favor of the defendant and warrantors, with costs in both courts,

Ratliff, for the warrantors and appellants.

Paterson, for the defendant.

. Prevost and another v. Martel, Executor, and others.

SAME CASE¹—ON AN APPLICATION FOR A RE-HEARING.

GARLAND, J. The plaintiffs have asked for a re-hearing, for the purpose of correcting the judgment, so far as to have the land claimed by the plaintiffs, and in the possession of the defendant, not included in the Bernard patent, decreed to them. We did not suppose that our opinion could be misunderstood on that point. The defendant and his warrantors never set up any claim, and, as the case is now presented, do not appear to have any rights beyond the limits of the Bernard patent. That grant is their sole protection; and from the pleadings, there does not appear to be any claim to possession beyond it. We, therefore, did not think it necessary to give a judgment, when no conflicting title was set up, nor adverse possession alleged. Riddle purchased at Hearsey's sale no more land than is contained in the patent and survey to Bernard, and he claims no more. We, therefore, do not think it necessary to disturb the judgment.

The re-hearing asked for is refused.

JACQUES L. PREVOST and another, Heirs of Maurice Prevost, deceased, v. PIERRE MARTEL, Testamentary Executor of the deceased, and others.

The will of one who died without legitimate children or descendants, contained the following provision: *J'institue pour ma légataire unique et universelle, ma sœur E. P., lui donnant et lui léguant à ce titre la généralité des biens que je délaisserai à mon décès.* Held, that this was an absolute institution of an universal heir, by which the legatee became entitled to the whole estate of the testator, and, after the death of the testator, seized of right of the effects of the succession, without being bound to demand the delivery thereof. C.C. 1599, 1602.

Art. 1474 of the Civil Code, which declares that where the father disposes in favor of his natural children of the portion permitted by law to be so disposed of by him, he shall dispose of the rest of his property in favor of his legitimate relations, unless he bequeath the rest to some public institution, does not constitute his legitimate relations his forced heirs for the rest of his estate. He is bound to dispose of the rest of his property in favor of his legitimate relations, but he may bequeath it to such of them, one or more, as he may select.

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Except in the case of accretion from legacies made to several conjointly, as provided for by arts. 1700, 1701 of the Civil Code, the legitimate heirs of a testator will inherit from him only such portion of the succession as may remain undisposed of, either because the testator has not bequeathed it to any legatee or instituted heir, or because the heir or legatee has not been able or willing to accept it, C. C. 1702. Legatees by an universal or particular title, benefit by the failure of the particular legacies which they were bound to discharge (C. C. 1697); and an universal legatee, when he concurs with a forced heir (C. C. 1603), and, *a fortiori*, when he does not, is bound to discharge all the legacies, except in case of reduction. Consequently, where a testator, dying without legitimate descendants, but leaving several brothers and sisters, institutes one of them his universal heir, such universal heir or legatee will be entitled to the benefit resulting from the failure or reduction of the particular legacies, to the exclusion of the other brothers and sisters.

Where the instituted heir consents to the execution of the particular legacy, the particular legatee cannot contest the right of the legitimate heirs to attack his legacy as illegal. The unwillingness or refusal of the instituted heir to contest the particular legacy, cannot render it valid; and the particular legatee being incapable of receiving, and the instituted heir unwilling to accept it, the particular legacy remains undisposed of, and must, under article 1702 of the Civil Code, devolve upon the legitimate heirs.

A testator, dying without descendants, instituted one of his sisters his universal heir. Another sister, and a surviving brother commenced an action against the executor of the deceased, the particular legatees, and the instituted heir, for the purpose of causing the legacies to be declared null. The instituted heir answered, through her attorney in fact, that plaintiffs could not attack the will, as the respondent, being the universal legatee of the testator, was entitled to claim the whole of his estate; averred that the dispositions of the will were legal and valid; and prayed that the petition might be dismissed, and the will maintained in all its parts. *Held*, that the averment of the validity of the will, and the prayer for its execution, do not amount to an acquiescence, on the part of an instituted heir, in the illegal dispositions, nor to a consent that the legatees shall take the legacies, notwithstanding their illegality.

An attorney in fact defending an action on behalf of his principal, unless specially empowered, cannot, by any allegations or confessions in the judicial proceedings, renounce or abandon any of the rights of his principal.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

SMON J. The petition represents that the plaintiffs, together with Emilie Prevost, the widow Majastre, are the only legitimate heirs of one Maurice Prevost, who died in March, 1843, leaving an olographic will, which was subsequently opened and proved by proceedings had before the Court of Probates; that the deceased, by his said will or testament, bequeathed a

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certain portion of his immovable property to one Florestine Cécile, a free woman of color, and all his moveable estate to one Clarisse, also a free woman of color, and that these legacies, together with the emancipation of several of his slaves, being duly executed, he instituted his absent sister, the widow Majastre, the universal legatee of the remainder of his estate. They further allege, that the legacies made to Clarisse and Florestine are void and illegal, and ought to be set aside, because Clarisse was his concubine, and could not receive any greater portion than that allowed by law; and because Florestine is the bastard daughter of the deceased, begotten by him from his said concubine, and is by law incapacitated from receiving any thing by testament; wherefore, they pray that the testamentary executor of the deceased, the said legatees, Clarisse and Florestine, and the absent universal legatee, the widow Majastre, who has an agent in the State, be all made parties to this suit; that those parts of the will which bequeath any property real or personal to the said particular legatees be annulled and set aside; that they, the plaintiffs, together with Emilie Prevost, be declared to be the legitimate heirs of said deceased; and that the special legacies made to Clarisse and Florestine be declared vacant and undisposed of, and be, as such, divided between the three heirs, &c.

The plaintiffs subsequently filed two supplemental petitions, in the first of which they state, that they have been informed that the immovable property bequeathed by the testator to Florestine, has been by him alienated, but that the testament provides that, in case the property should not be found in kind in the succession, then a sum of \$5000 is to be paid to the legatee in lieu thereof. In the second, they allege that Florestine Cécile, being the child of Clarisse, who was notoriously the concubine of the deceased, is but a person interposed by the testator, for the purpose of evading the provisions of the law, and of bequeathing to Clarisse a greater portion of his estate than is allowed by law.

The widow Majastre joined issue, through her attorney in fact, who pleaded; 1st. That admitting the plaintiffs to be the brother and sister of the deceased, they have no right to assail

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his last will and testament, in as much as the respondent, being the universal legatee of the testator, is the only person entitled in any case to claim the whole of his estate. 2d. She denies the allegations contained in the plaintiffs' petition, and asserts that all the dispositions contained in the will of the testator are legal and valid and must be maintained; wherefore she prays that the will of the deceased be executed in all its dispositions, and that the plaintiffs' demand be dismissed.

Florestine Cécile also filed her answer, in which she begins by denying that the plaintiffs have any color of interest, or show any capacity that could give them any right to prosecute this suit, averring that its decision can by no means benefit or prejudice them, and that, on this ground alone, they ought to be dismissed. She further denies the allegations of the plaintiffs' petition respecting the relation in which she stood towards the testator; and alleges that, being born a slave, she was, at the age of three years, emancipated by an individual named Miguel Constant, who considered her as his daughter, &c.; and she further specially denies all the allegations of the said petition whereby the dispositions favorable to her in the last will of the deceased are sought to be annulled and destroyed, and prays that said will be maintained, and declared legal and valid, &c.

This case was tried below on the question of interest only; the widow Majastre pretending that the plaintiffs have no right to claim any part of the testator's estate, even supposing the legacies contained in his will were illegal or subject to be reduced, because, as universal legatee duly instituted by the said will, she is entitled to inherit the whole of the testator's estate, to the exclusion of his other legitimate collateral relations; and accordingly we find in the record a written consent, signed by all the counsel of the parties, in the following words: "At the request of the plaintiffs in this case, the question raised by way of exception, which denies the right claimed by said plaintiffs of having, in preference to the universal legatee, the benefit of any failure in the particular legacies devised by the will, was alone submitted to the decision of the court. In the actual state of proceedings, the plaintiffs consider that unless they be maintained in the position which they have assumed in

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relation thereto, they can have no interest in the suit, and must be dismissed. But should this preliminary question be decided in their favor, then the case being remanded, they would of course be at liberty to bring their evidence before the inferior tribunal, and to try the facts on their merits."

The judge *a quo* being of opinion that, according to the spirit of articles 1474 and 1702 of the Civil Code, every portion of the succession, disposed of against the prohibitions of the law, must devolve upon the heirs of blood of the testator, overruled the defendant's exception of want of interest in the plaintiffs; and from this judgment, the widow Majastre, the executor, and Florestine Cécile have appealed.

The disposition of the will relied on by the widow Majastre, as instituting her the universal heir or legatee of the testator, is as follows: *J'institue pour ma légataire unique et universelle ma sœur Emilie Prevost, veuve Majastre, résidente à New York, lui donnant et lui léguant à ce titre, la généralité des biens que je délaisserai à mon décès.*" This institution is clear and explicit; it is subject to no condition; it is an absolute institution of an universal heir, by which the legatee becomes entitled to take, not *the remainder* of the succession, as it is alleged in the petition, but *the whole estate* of the testator, and by which the universal legatee, after the death of the testator, is *seized of right of the effects of the succession*, without being bound to demand the delivery thereof. Civil Code, articles 1599, 1602. Thus, it is clear, that the testator has left nothing undisposed of.

The judgment appealed from, however, on the supposition that the particular legatee is the natural child of the testator, intimates, though it does not decide the question absolutely and directly, that under the provision contained in article 1474 of the Civil Code, the plaintiffs must be entitled to recover their portions of the estate of the deceased, as also by the terms of article 1702, which, he says, are calculated to protect good morals, and have also the direct tendency to avoid agreements and understandings between the testator and his testamentary heir, which might defeat or impair the object of the law.

Article 1474 says, that "*in all cases in which the father disposes, in favor of his natural children, of the portion permitted him*

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by law to dispose of, he is bound to dispose of the rest of his property in favor of his legitimate relations." We cannot understand this provision of our law as making the legitimate relations of a testator *his forced heirs* for the three-fourths of his estate, when, having brothers and sisters, he wishes to dispose, under article 1473, of the one-fourth of his property in favor of his natural child. It only indicates that he shall be bound to bequeath the rest of his estate to his legitimate relations, that is to say, to such of his legitimate relations as he may think proper to select; and it seems to us that, without being obliged to dispose in favor of all and every one of his legitimate relations, the testator sufficiently complies with the law, when after satisfying the legacy by him made to his natural child, the balance of his succession goes to one or more of his said legitimate relations in the proportion fixed by article 1478. It is clear, therefore, that, in this case, the disposition contained in the will in favor of Emilie Prevost the testator's sister, by which she is instituted his universal heir, is perfectly legal and valid, and that she has a right to inherit under the will, to the exclusion of the testator's other legitimate relations.

But the real question submitted to our solution by the counsel on both sides, under their written agreement, is, whether the plaintiffs are entitled to share equally with their sister the amount which would proceed from the failure of the particular legacies, or from their being reduced to the portion permitted by law to be disposed of? or, in other words, is the universal legatee entitled to the exclusive benefit of the failure of the particular legacies, or of their reduction?

Article 1702 of the Civil Code provides that, "except in the cases prescribed in the two preceding articles, *every portion of the succession remaining undisposed of, either because the testator has not bequeathed it either to a legatee or to an instituted heir, or because the heir or the legatee has not been able, or has not been willing to accept it, shall devolve upon the legitimate heirs.*" This article is preceded by article, 1697, which says, that "*legatees under an universal title, and legatees under a particular title, benefit by the failure of those particular legacies which they were bound to discharge.*" From the words of the first of these articles, it seems

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that the intention of the law-maker was, that the legitimate heirs of the testator should inherit from him any portion of his succession remaining undisposed of, only in case said testator had not bequeathed it to a legatee or to an *instituted heir*, or when such heir or legatee has not been able or willing to accept it; and from the terms of the second, it is manifest that when a legatee is bound to discharge any particular legacy, he is entitled to benefit by the failure of such legacy. We have already shown that, under arts. 1599 and 1602 of the Civil Code, the universal legatee, by the death of the testator, *is seized of right of the effects of the succession*, without being bound to demand the delivery thereof, when the testator has left no forced heir; and art. 1603 informs us, that *the universal legatee*, even when he concurs with a forced heir, *is bound to discharge all the legacies*, saving the case of reduction, and, *a fortiori*, must he do so when he does not concur with any forced heir. See Toullier, vol. 5, No. 679, who says: "*C'est lui qui acquitte seul tous les legs, quand même il serait en concours avec un héritier légitimaire.*" Ibid. Nos. 507, 557. Ibid. vol. 4, Nos. 515 and 552. It is clear, therefore, that in this case, there being no forced heir, the universal legatee is bound to discharge all the legacies; that she would be bound to discharge the legacies complained of by the plaintiffs, if the legatees were capable of receiving; and that, in case of their failure, she should be entitled to take them as a part of the succession, or, in the terms of the will, as a part "*de la généralité des biens*" left by the testator.

But this question, which is perhaps a new one in our jurisprudence, does not appear to be subject to any difficulty in the country from which we have borrowed the greatest part of the provisions of our Civil Code; and although articles 1697 and 1702 are not found embodied in the Napoleon Code, and seem to have been adopted by our legislature with the view of adding these provisions to those contained in the French Code on the same subject, we have thought proper to consult several French commentators, whose opinions we have found to be unanimous upon this important point of our laws. Denizart, in his collection of jurisprudence, vol. 1, *verbo* Accroissement, § 4, says: "*Quant aux légataires universels, en général les legs particuliers*

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caducs leur appartiennent à titre d'accroissement, préférablement à l'héritier ;" and he cites a case in which the question was settled contradictorily with the heirs of a testatrix. Touillier, vol. 5, No. 677, says: "*Le droit de profiter de la caducité des legs, est attaché à la charge de les acquitter, dans le cas où ils ne seraient pas caducs. Il est naturel que ceux qui doivent supporter la charge de ces legs, en retirent aussi les avantages éventuels, &c.*" This is also the opinion of Duranton, vol. 9, No. 495; and of Grenier, *Traité des Donations*, vol. 2, No. 349, who decides that, "*S'il n'y a point de legs universel, il est évident que la caducité tourne au profit des héritiers ab intestato ;*" and "*s'il y a un légataire universel, la caducité lui profite.*" See also Merlin, *Repert. vo. Légataire*, § 2, in which this doctrine is fully investigated, in a case, in which, though somewhat different from that under consideration, his opinion coincides with those of the authors already quoted; and Touillier, Nos. 507 and 679, who expresses positively his opinion that: "*C'est le légataire universel qui recueille seul tous les legs caducs, même à l'exclusion du légitimaire, qui n'a rien à prétendre au delà de sa réserve.*" and Sirey, vol. 9, Part 1, p. 303, who reports a case in which a similar opinion was expressed by the Court of Cassation. The provisions of our law on this subject are too clear and too positive to be disregarded, under the pretext of pursuing its spirit; and, under our system, we feel no hesitation in concurring in opinion with the authorities above referred to, and in concluding that in case of the failure of the legacies made to Florestine Cécile and her co-legatee, or of their reduction, the universal legatee has a right to consider them as a part of the inheritance of the whole estate—"*de la généralité des biens,*" and that they must enure to her benefit.

But it has been urged by the plaintiffs' counsel, that the universal legatee, having set up, in her answer, that the dispositions contained in the will are legal and valid, and must be maintained, and having prayed that said will be executed in all its dispositions, this amounts to a renunciation on the part of the said universal legatee of the benefit of the failure of the particular legacies, and that, in such a case, such failure must enure to the benefit of the heirs. Hence, it has been ingeniously ar-

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gued, that the doctrine entertained by the authors relied on by the appellants' counsel, though perhaps incontrovertible even under our laws, is only applicable to the case in which the universal legatee himself seeks to contest the validity of the particular legacies, and not to a case in which he consents to the execution of the will; and the appellees' counsel has referred us to the case of *Mirandol*, quoted and argued on at full length by Merlin, *Répertoire, verbo Legataire*, § 2, in which the principle is repeatedly recognized: "*Que lorsque l'héritier institué consent à l'exécution du legs particulier, le légataire particulier n'est point recevable à contester l'intérêt de l'héritier légitime, qui attaque son legs.*" This doctrine is certainly correct, and we should be disposed to adopt it, as being within the true spirit, and even within the letter of our article 1702, for, then, the amount of the particular legacy would remain *undisposed of*, not only because the particular legatee would not be able to receive it, but also because, the instituted heir being willing to take it as a part of the whole of the succession, this acquiescence on his part cannot strengthen or in any manner perfect the right of the particular legatee, who is incapable of receiving; and as it is obvious that the consequence of such an acquiescence would be, under art. 1702, that the portion of the succession so undisposed of, or repudiated by the universal legatee, would devolve upon the legitimate heirs. It is also clear that the particular legatee has no right to benefit, when his legacy must fail as an illegal one, from the unwillingness or refusal of the instituted heir to disturb it, and to reap the fruits of an illegal disposition to the prejudice of the heirs. But here there is no such abandonment of the right of the universal legatee. The latter, on the contrary, sets up the exception that the plaintiffs have no right to attack the will, because *she is the only person entitled to claim the whole* of the estate; and she does thereby virtually claim the whole succession. It is true she denies the allegations contained in the plaintiffs' petition, asserts that all the dispositions contained in the will are legal and valid, and prays that said will be executed; but this is only for the purpose of joining issue with the plaintiffs on the allegations of the petition, and on the supposition that those allegations cannot be established. There

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is a vast difference between the issue joined on the facts alleged in support of the plaintiffs' demand, and a consent, on the part of the universal legatee, to the execution of the legacies, after they have been shown to be illegal. *Non constat* that they are illegal, because the plaintiffs say so; and it seems to us that the instituted heir does not go too far in maintaining that, if said legacies are proved to be illegal and void, the plaintiffs have no interest, because the same must devolve upon the universal legatee; and this issue necessarily called for by the plaintiffs' petition, cannot, in our opinion, be construed as an acquiescence in the illegal dispositions, nor as a consent that the legatees should take the legacies, notwithstanding their illegality.

Furthermore, the universal legatee is only represented in this suit by an agent, who, unless with sufficient and special powers, cannot, in the defence of the rights of his principal, make any abandonment or renunciation of her said rights; and it is obvious that the universal legatee would not be bound by the unauthorized acts of her agent, though found in, or resulting from allegations or confessions made in judicial proceedings.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be annulled and reversed; and that the plaintiffs' petition be dismissed, with costs in both courts.

St. Paul and H. R. Denis, for the plaintiffs.

Graudmont, C. Janin, and Soulé, for the appellants.

THOMAS GILMORE v. NICHOLAS NOEL DESTREHAN:

A note, not negotiable, in the hands of a third person, is subject to all the equities and defences which might have been opposed by the maker against the payee.

The general rule is, that he who affirms must prove; but, where a note payable to the payee personally, is on its face not negotiable, and the latter declares, in an agreement with the maker of the same date with the note, that the maker shall be bound to pay the same, only in the event of the payee's complying with two conditions, to wit, not endorsing a certain bond, and performing certain work, and the maker relies on a non-compliance by the payee with the conditions of the agreement, it will, on the principle that a negative cannot be proved, be for the defendant to prove that the payee did endorse the note, and for the plaintiff to establish a compliance with the other condition, to wit, his performance of the work

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APPEAL from the District Court of the First District, *Buchanan*, J.

SIMON, J. The defendant is appellant from a judgment which condemns him to pay to the plaintiff the amount of a note originally made payable to one John McAuliff personally, against the payment of which note said defendant sets up, substantially, as his defence, that he does not owe the amount thereof, as the same was given on certain conditions which were not complied with by the payee.

The evidence shows that the note sued on, which is made payable four months after date, to John McAuliff personally, was, under a written agreement signed by the payee, bearing the same date as the note, to be valid only on two conditions: 1st, that said payee should not endorse a certain bond described in the said agreement; and 2d, that he should chop and fell certain trees also thereon described, and convert the same into cordwood, at a certain price, and within limited periods; and the payee declares in the said written agreement, that the said note having been received by him under those conditions, it is understood that, "in case he, the payee, should not have begun on the day thereon fixed, and continued chopping every day at least ten cords, then the drawer may refuse to let him chop the wood, and thereby refuse to pay him the note or any part thereof, *the same being valid only under the conditions being complied with on said payee's part.*"

It is further established that some time before the note became due, the same was seized and sold, in virtue of executions issued on judgments against McAuliff; that it was sold and adjudicated to the plaintiff by the city marshal; that all the proceedings on said executions were regular and legal; and that, on the day of the sale and previous to the adjudication, the defendant audibly informed the public that "said note had been issued in virtue of a private agreement, showing the value thereof, in as much as the clause contained in said agreement should be complied with by McAuliff; otherwise, if the clauses contained in said agreement were not complied with by said payee, the note would be null and void."

It is perfectly clear that the note sued on, not being on its

face a negotiable instrument, is subject to all the equities and defences in the plaintiff's hands, which might have been opposed to its recovery or payment, by the maker as against the payee himself. Here, the plaintiff had also full notice of the consideration of the note, he bought it at his peril, and acquired no other rights than those of the payee ; and if the latter could not recover, it is clear the plaintiff cannot.

Now, under the terms of the agreement produced by the defendant, it cannot be denied that the defendant's liability to pay the amount of the note sued on, depended upon the plaintiff's complying with two conditions, to wit, that he should not endorse a certain bond, and that he should do the work therein mentioned ; nay, the very expressions used in the contract show, that the parties intended that the payment of said note should not, or could not be enforced unless the payee could show that he had complied with his part of the obligations ; and, accordingly, it was therein stipulated, that *the maker might refuse to pay the amount of said note, the same being valid only under the conditions being complied with on said payee's part.* It is evident, therefore, that the note alone, between the maker and the payee, was not a complete obligation on the part of said maker to pay the amount thereof, and that no recovery could be had thereon by said payee without proof of the fulfilling of the obligations by him contracted.

The defendant complains that McAuliff did not comply with the second condition ; that he did not chop and cut down the trees on his, defendant's, plantation, and did not in any manner perform this part of the obligation ; and the question presents itself, on whom does the burthen of proof lie ? The general rule is, that he who *affirms* must *prove* ; but where the affirmative involves a negative, as was the case here with regard to the payee's second obligation, namely, that he *did not* do the work undertaken by him in his contract, and which was to be the consideration of the note, then the proof of it must come from the party whose rights depends upon such performance, for a negative cannot be proved. As to the first condition, however, that the payee should not endorse a certain bond, if the defendant had relied upon a non-compliance with it, it is clear that, the affirmative

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being on his side, to wit, that the obligor had endorsed the bond, it would have been his duty to prove the fact: for, again, a negative cannot be proved. But, with regard to the second condition, we are of opinion that, as the performance of the payee's obligation cannot be considered but as a suspensive condition, necessary to give effect to the maker's obligation, that is to say, under which the effect of the note sued on was to be suspended (Civil Code, arts. 2088 and 2016), it was the plaintiff's duty to establish the fact of performance; and that the defendant could not be required to prove a non-performance.

We conclude therefore that, as the case stands, the plaintiff is not entitled to recover; but, as the absence of proof on his part, may have proceeded from the expressed opinion of the judge *a quo* that the *onus probandi* was on the defendant, who had pleaded the non-performance of the conditions in bar of the action, we think justice requires that this case should be remanded for a new trial, in order to give the plaintiff an opportunity of adducing such evidence in support of his claim as he may be able to furnish under the principles recognized in this opinion.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that this case be remanded to the court below for a new trial; the appellee paying the costs of this appeal.

Wray, for the plaintiff.

Grailhe, for the appellant.

WILLIAM T. HEPP v. MICHEL COMMAGÈRE and another.

To recover the penalty stipulated to be paid, in case of non-compliance by defendant with a contract to deliver certain articles, plaintiff must prove that defendant was put in default previous to the commencement of suit. C. C. 2122. Putting the defendant *in mora*, is an indispensable pre-requisite to such an action. C. C. 1906. The want of it need not be specially pleaded; nor is the effect of the omission to put defendant in default waived by his setting up any special defence.

APPEAL from the District Court of the First District, *Buchanan, J.*

Lockett and Micou, for the appellant.

Roselius, for the defendants.

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MORPHY, J. This action is brought to recover \$1500, as a penalty for the breach of a contract, whereby it is alleged that the defendants bound themselves, on the 15th of August, 1837, to sell and deliver to the plaintiff three thousand cords of wood, the delivery to commence on the 1st of September following, and to continue at the rate of at least one hundred and twenty-five cords per month, or more, if possible, until the three thousand cords should be delivered, and the plaintiff to pay for the wood five dollars per cord. It is further alleged, that the defendants commenced and continued to send wood to New Orleans, under their contract, until about the month of July, 1838, when, after delivering less than one-third of the whole quantity contracted for, they totally neglected and refused to comply with their obligations; that, at the date of this contract and since, the plaintiff was engaged in buying and selling wood for profit; that the contract was made to keep up a regular supply to meet the demands of his customers, which fact was known to the defendants; that, in consequence of their failure to complete their contract, the plaintiff had to buy wood at higher prices than those agreed upon with the defendants, and consequently lost the profits he would have made: by all which, it is averred, that the plaintiff has sustained loss and damage far beyond \$1500, the penalty stipulated in the contract to be paid in case of its violation by either party. After pleading the general issue, the defendants admitted the existence of the contract, and averred that they had complied with the obligations it imposed upon them; they allege, that after a large quantity of wood had been delivered, the plaintiff requested that they should not send the wood as fast as they were doing, alleging that he had more wood than he had room for; that, for some time, the water in the Barrataria canal was so low as to be entirely unnavigable, in consequence of which the delivery of wood was suspended; that the Barrataria canal was the only channel by which the wood could be sent to New Orleans, to the knowledge of the plaintiff when the contract was made; that, as soon as there was a sufficiency of water in said canal to enable them to send wood to New Orleans, they availed themselves thereof, but that the plaintiff refused to receive the

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wood offered to him ; that when the refusal took place, on the part of the plaintiff, the contract was virtually annulled between the parties ; &c. The first jury empanelled to try this cause not having agreed, it was laid before another jury, who gave their verdict in favor of the defendants. From the judgment pronounced thereupon the plaintiff appealed, after failing to obtain a new trial.

The judge below charged the jury that plaintiff could not recover, as, previous to the institution of this suit, the defendants had not been put in default. This charge was objected to as erroneous, on the ground that the pleadings show that no express denial of default was made in the answer, and that a special defence was therein set up. The judge, in our opinion, did not err. The Civil Code declares, article 2122, that the penalty is forfeited only when he who has obligated himself, either to deliver, to take, or to do a certain thing, is in delay ; and it further provides, article 1905, that when, by the terms of the contract, or the operation of law, the party is not *in delay*, he can only be put in default by the act of the obligee, who must demand the performance of the contract by the commencement of a suit, a demand in writing, a protest by a notary, or a verbal requisition in the presence of two witnesses. Now, the plaintiff has not alleged nor proved that he has called upon the defendants, in either of the ways above pointed out, to comply with their contract. This putting in default being, under our law, an indispensable pre-requisite to sustain an action of this kind, it was not necessary to plead the want of it specially, nor is it waived by the defence set up in the answer. Civil Code, art. 1906. 6 Mart. N.S. p. 624. 13 La. 229.

On the merits, although the evidence appears to us to preponderate in favor of the plaintiff, the verdict of the jury, under all the circumstances of the case, is not so manifestly erroneous as to make it our duty to disturb it.

Judgment affirmed.

Peychaud v. Pilié and others, Executors.

HENRY PEYCHAUD v. LOUIS PILIE and others, Testamentary Executors of Lucien Guillaume Hiligsberg, deceased.

APPEAL from the Court of Probates of St. Bernard, *Rousseau, J.*

Denis, Pitot, and Benjamin, for the plaintiff.

Bernard, Pilié, and Roselius, for the appellants.

SIMON, J. The defendants, who represent the succession of the late L. G. Hiligsberg, as the testamentary executors of the deceased, are appellants from a judgment which allows to the plaintiff the sum of five thousand dollars, as a just compensation for certain services by him rendered to the deceased, in examining, reviewing, and balancing the commercial books of the late J. B. Canfrancq, and orders the said sum to be paid in due course of administration.

The petition represents that no compensation was agreed on between the deceased and the petitioner; that the latter undertook the work, which was a most laborious and intricate one, and was occupied at it during a whole year, being obliged to work the greatest part of his nights in order not to delay it; that he was obliged to employ a clerk to aid and assist him, and to pay his travelling expenses, &c.; and that the said work, having been terminated, in April, 1843, was transmitted to the deceased, by whom it was received, and with whom the petitioner has never been able to have a settlement, as he, deceased, was so sick that he could not attend to it, though often applied to for that purpose.

This case presents a mere question of fact, the solution of which depends upon the testimony of divers witnesses heard on both sides, and which we have attentively perused, and carefully reviewed in all its bearings upon the rights and pretensions of the parties.

It is admitted by the defendants, in their capacity of executors, that the plaintiff was employed by the deceased to strike the balance of the books belonging to the late J. B. Canfrancq; which books consisted of *six journals, one ledger, one balance sheet, and*

ten folios, all introduced in evidence, the said ten folios being written by the plaintiff.

The first witness introduced by the plaintiff, is J. F. Barthelemy, who was employed by the plaintiff to assist him in making the balance of all the books of Canfrancq. These books begin from the eighth year of the French Republic, and continue up to December 1821. They contain the work which was done by the witness and the plaintiff. It appears from this testimony that the witness labored with the plaintiff for three months and a half, during all the days of the week, from 4 to 9 o'clock P. M., and on Sundays from 9 to A. M. to 3 P. M., for which the witness was employed by the plaintiff at the rate of \$40 per month, with a promise that more should be allowed as an *extra* compensation to be paid when plaintiff should receive his own. Plaintiff was a book-keeper in the Citizens Bank, and when he was appointed clerk of the Parish Court of New Orleans, (20th March, 1843,) was still working at those books. He had begun in March or April, 1842, and after having worked at the books for five or six months, having made the balance of all the balances, and all the additions in all the books, and checked all the entries from the journal to the ledger, being unable to find out the errors that existed, was about abandoning the work, when, at the witness' suggestions, he began the folios from one to ten, taken from all the journals, and a new ledger, in order to find out all the errors; and, after having made the new ledger, witness and plaintiff were obliged to check the new ledger with the old one, in order to find out the omissions and errors. In writing out the ten folios, plaintiff was occupied two months and a half, for five or six hours every day, and on Sundays from morning till night; and before commencing the folios, plaintiff was occupied in making out the balance of all the balances, and checking the items from the journals to the ledger. After the work had been performed, there was still an error undiscovered, which was discovered afterwards by the plaintiff, without deponent's assistance.

A. Baudouin, the next witness, proves that he examined the books of Canfrancq made out by the plaintiff, and that he saw the latter whilst he was attending to this business. The witness

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goes on to state divers cases, in which he was employed and remunerated for similar services, and says, that whilst he was cashier of the Consolidated Association, he was employed by the bank itself, with a compensation of \$3000 *extra* salary, to cancel notes of the old emission, which, in his opinion, was not one-half of the work in question. He had occasion to see and examine the work done by the plaintiff, and *would estimate the value of said plaintiff's services at \$6000*, and he gives the reasons upon which his estimation is based. He further says, that this kind of work requires extraordinary ability, because the man who has no method could not have performed it. He has seen plaintiff at work, and has examined the result of his labors. The work was completed about six months previous to Hilligsberg's death. The witness considers the work done by one man, which requires one year for its performance, as equal to two years, when an assistant is required; and he considers the work done by plaintiff as equal to the work of a book-keeper for two years, with an assistant. Book-keepers in large houses generally receive about \$3000 per annum.

Judge Maurian testifies, that he has examined the books; that he is himself conversant with book-keeping, and knows the difficulties encountered by plaintiff in his undertaking. He has seen plaintiff working at the business for more than one year, and often in company with Mr. Barthelemy, who was, part of the time, engaged in assisting him. The witness says, that he had occasion to examine the nature of the work, the details of which are immense, and susceptible of being understood only by persons entirely versed in book-keeping. He gives a detailed statement of the nature and extent of the work, and says, that from the knowledge he has of the whole work, he considers *the charge made by the plaintiff as extremely moderate*. He considers the intrinsic value of the work done to be much more than the price charged, and, with respect to the party who required it, he has no doubt that the value thereof must have been much greater, if he is right in the object which he supposes that person must have had in view. He says further, that out of fifty, perhaps one hundred book-keepers in New Orleans, there are hardly two to be found who could bring such an undertaking to

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a successful issue. The deponent further states, that he urged the plaintiff to have a settlement with Hilligsberg before he died, as very few persons would be able to know the extent of the work, and as Hilligsberg, having a proper idea of its magnitude, would compensate him accordingly.

Gustave Tournade, who is a book-keeper, swears that the deceased proposed to him to undertake the work, but that on examining it, he found it so difficult and immense, that he refused to undertake it. He gives certain details of the extent of the work, in which he corroborates the statements made by the witness Barthelemy; and testifies that, from his knowledge as a book-keeper, and of the books labored on by plaintiff, and the work done by the latter, he thinks *the charge made a very moderate one.*

Louis Bernard, who had been cited by the defendants, but who was sworn by plaintiff, after giving divers particulars as to the extent of the work, and the time employed by plaintiff in performing it, says, that *the compensation demanded by said plaintiff is not exaggerated*, and that he, witness, would not have done it for that sum, particularly at that time. His opinion is based, not only upon the length of time employed in doing the work, but also on its difficulty.

Chevalier Jumonville, another witness cited by defendants, but called by plaintiff, testifies, that having heard the testimony just given by Bernard, he corroborates it in all its parts.

Gustave Cruzat states that he has examined the work, and that, from its immensity, and the time and labor necessary to perform it, he thinks *the charge of \$5000 is not extravagant, but reasonable and moderate.* He is a book-keeper.

Alphonse Miltenberger, the last witness for plaintiff, swears that he has examined the work done by plaintiff, and that he does not think *the charge of \$5000 to be too much.*

Three witnesses were examined on the part of the defendants, to wit: William Larue, who testifies that he has examined the books as containing the work done by plaintiff; that they embrace a period of twenty years; that he thinks competent book-keepers could have been found to perform it, but that they would have charged good salaries for it. He scarcely thinks a

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price can be named for this work, considering the time and labor necessary to perform it, and he would not himself have undertaken it. He made an estimate at the time of the examination of the books; valued the work at first at \$1000, and afterwards raised it to \$1200, but learned since that there was an error, to correct which it was necessary to make out a new ledger from the journals.

Henry Hoffmeyer says, that he is a book-keeper, and has examined the books, and that, from what he saw, he would not do the work himself for \$3000, in order to discover the error. He gives his ideas as to the manner of finding out the errors; deems it impossible to say what would be the precise value of the work, and *would have done it for \$5000*. He states, further, that it would take a year; at least, to do the work, and that it would take four weeks for each folio, and ten months for the ten folios.

And George Legendre testifies, that he has examined the books; that, if an incompetent book-keeper had made the additions in the journal and ledger, and had been unable to strike a balance, he would consider the work and labor to be done by another, to find the balance, much more laborious than the first examination. He states his views upon what should have been done; thinks these books would take from eighteen to twenty months to be checked once by one person; and says, that if he had been called upon to strike and find the balance, after it had been tried before, he thinks *he would have demanded the sum of \$4000*: he does not pretend to say that it might not have been worth more, but he would not have asked more.

It is also shown, by the testimony of Latour, that the plaintiff, previous to the death of Hilligsberg, came to request Mr. Pilié, who was at one time the agent of the deceased, to effect a settlement with the latter, for the work which plaintiff had done for him. Pilié was unwell at the time, and plaintiff did not see him. Pilié was too unwell to attend to this business, and Hilligsberg died before plaintiff could see Mr. Pilié.

With this evidence before him, we are not prepared to say that the conclusion adopted by the judge *a quo* is erroneous, and that the amount allowed to the plaintiff is excessive. Indeed,

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the testimony of all the witnesses who have been heard on the subject in controversy, who are all very respectable persons, perfectly competent, and shown to be well versed in the science of book-keeping, establish positively that the plaintiff is entitled to a compensation of \$5000; nay, some of them say that it is worth \$6000, and a majority of the witnesses concur in the opinion that the charge made by the plaintiff is a very moderate one. It appears also, from the testimony of Judge Maurian, who was well acquainted with the nature and extent of the work, that it was of great importance to the deceased that it should be well done; he says that, with respect to the party who required it, he has no doubt its value must have been much greater than the price claimed; and, if we consider that, the object of the operation being to find out errors which existed in commercial books containing entries of important commercial transactions during a period of twenty years at least, it was necessary to check every item, to transcribe them into new books, to strike the balances of every year, and to bring the entries and yearly balances to a general and correct balance, free from all errors, we may well judge of the importance of the undertaking, and of the time and labor necessary to perform it. This the plaintiff undertook to perform; and it is not pretended that his long, laborious, and tedious task was unsuccessful. On the contrary, the evidence shows that Hilligsberg attained his object, and that the work was well and satisfactorily done. In 13 La. 413, in the case of *Howe v. Manning's Executor*, to which we have been referred, it is true, this court held, that *the reasons which induce an inferior judge to disregard the testimony of witnesses, as well as the fact itself that he did disregard it, have great weight with us, and that he can give judgment, if he believes the witnesses are not telling the truth, as if no evidence had been adduced*; but in a case like this, where the evidence is so concordant upon the facts sought to be established; where the witnesses, all respectable and competent, agree upon the fairness and legitimacy of the plaintiff's demand; and where the testimony is corroborated by the defendants' witnesses, who, with the exception of one, go almost to the same extent as to the compensation in controversy, how

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could we disregard it with any sense of justice or propriety? The case cited has no application to this. The testimony in this case was not disregarded below, and, we think, the judgment appealed from ought not to be disturbed.

Judgment affirmed.

**JUAN GREGORIO FUNES Y CARILLO v. THE PRESIDENT, DIRECTORS, AND
COMPANY OF THE BANK OF THE UNITED STATES.**

An actual bankruptcy or *cessio bonorum*, either voluntary or forced, alone has the effect of rendering immediately exigible debts not matured by the lapse of the time stipulated in the contract, or by the happening of the contingency on which the parties agreed that they should become payable. The mere fact of the insolvency of the debtor does not produce such an effect. C. C. 2049.

Where a debt is payable at a particular place, a demand by the creditor there, is a condition precedent; and must be made before instituting suit.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* This action was commenced by attachment. The petition alleges that the President, Directors and Company of the Bank of the United States, a corporation created by the State of Pennsylvania, located in the city of Philadelphia, holding property within the jurisdiction of the court, are indebted to the petitioner in the sum of \$48,400, with interest at five per cent a year, from the 1st April, 1837, he being the holder and owner of ten promissory notes, or bonds, each for £1,000, drawn by the defendants, payable to bearer, in London, on the 1st April, 1847, with interest at five per cent a year, payable semi-annually at the office of F. Kuth & Co. That the defendants have failed and refused to pay the interest due on the 1—4 April and October of each year, although legally demanded of them. That since the making of said notes, the defendants have become notoriously insolvent; and have made, at Philadelphia, assignments of all their property to certain preferred creditors to the exclusion of the petitioner, in consequence whereof he has lost all security for the payment of his debt. The petition concluded by praying that W. W. Frazier and C. Adams, as receivers of the assets of the defendants, Robert Copeland, and others be made

garnishees, and ordered to answer certain interrogatories propounded, with a view to ascertain whether they were indebted to the defendants, or had any property of the latter in their hands or under their control.

The defendants answered by a general denial; averring, further, that they have no property within the jurisdiction of the court. They prayed that the attachment and suit might, consequently, be dismissed.

John Bacon and certain other persons residing in Philadelphia, intervened, representing that the plaintiff had caused an attachment to be levied upon property belonging to the intervenors, and had garnisheed certain persons who are their debtors, and not the debtors of the defendants. They aver that said property was assigned to them, long before the attachment, by certain deeds, which they offered in evidence. They pray that the property may be deemed to belong to them as such assignees; that the attachment may be dissolved, and the garnishments set aside; and that the proceedings of the plaintiff be adjudged unlawful; but should the court be of opinion that their title can be investigated, without the institution of a revocatory action, they pray that the said assignments may be declared legal and valid; and for all equitable relief.

In answer to this intervention the plaintiff, after a general denial of all the allegations therein contained, averred that at the time of the assignments the defendants were notoriously insolvent, and are so still; that the assignments were never assented to by him, and were made in fraud of his rights, and operate to his injury; that he was a creditor of the defendants at the date of said assignments; and that they were illegal and fraudulent, and made with intent to hinder, delay, and defraud him. He prayed that the intervention might be dismissed.

The case having turned on other questions, the answers of the garnishees, and other evidence of property having been attached, are immaterial. The judge below was, however, of opinion that the title to certain real property was yet in Frazier, one of the garnishees, and that the court had, consequently, jurisdiction. The bonds were introduced in evidence, and the signatures to them proved. The evidence taken on behalf of

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the plaintiffs and interveners in the suit of *The United States v. The Bank of the United States* (8 Robinson), was also introduced in evidence. It was agreed that the laws of England might be proved by elementary treatises, and the Reports ; and those of Pennsylvania, by Purdon's Digest, and the printed statutes and decisions of its courts.

W. W. Frazier, a witness for the plaintiff, deposed that he had no certain knowledge on the subject, but that, in his opinion, from the embarrassed condition of the Bank of the United States, there is not the slightest probability that the bank had, in April last, or since, any money in London to meet the interest-*coupons* of the bonds sued on.

Burnley, another witness introduced by the plaintiff, testified that the bonds sued on were given to Fred. Kuth & Co., of London, who advanced the money to the Bank of the United States at the date of the bonds ; that he understood and believes that no pledge or other security was given by the bank at the time, or has been since given, to secure the payment of the bonds, or the interest due or to become due ; that Kuth & Co. are bankers and merchants in London, and continued to hold said bonds until 1842, when they were transferred to the plaintiff ; that two or three interest-*coupons* next preceding the one which first matures of those now attached to the bonds sued on, are unpaid, and were cut from said bonds in Philadelphia, and there presented to the bank for payment ; that neither they nor the *coupons* attached to the bonds have ever been paid, and were all forwarded to this country for collection, because there was no money or assets of the bank in England to pay the interest-*coupons*, and because the bank had become notoriously insolvent, and had made the assignments of 1841. He further deposed, that he had been informed and believes that, neither at the maturity of the said *coupons*, nor since, has the bank had any money or assets at the place of payment of said bonds and *coupons* ; that he is morally certain that the facts stated by him are true, though he has not been in England since 1842 ; that at least one of the interest-*coupons* of said bonds was due and unpaid for want of funds, while F. Kuth & Co., held said bonds.

In answer to a question of the counsel for the defendants,

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whether he knew, of his own knowledge, that any of said *coupons* were presented at maturity at the place designated for payment, or have been so presented at any subsequent period, he stated—that all he can say is, that said *coupons* were in the possession of Kuth & Co.; that they could not present them but to themselves, and that no offer was made to pay them; that the reason why he says that they were in possession of Kuth & Co. at maturity, is only because Kuth & Co. told him so, and because the plaintiff received them from Kuth & Co., but that he has no personal knowledge of the fact. He added, that he has a personal knowledge of the fact that some of the *coupons* remained unpaid after maturity; that he brought them back unpaid to this country; and that demand of payment was made of the bank at Philadelphia, but unsuccessfully.

There was a judgment below against the plaintiff, as in case of non-suit, on the ground that there was no proof of demand of payment of the *coupons* at the place designated, and no allegation or proof of any fact entitling the plaintiff to anticipate the day of payment of the principal debt, which becomes due only on the 1st of April, 1847. The plaintiff appealed.

B. Peyton and *I. W. Smith*, for the appellant. The judge below erred in considering the debt sued on as not due and payable. The objection, taken verbally on the trial, under the answer of the general denial, came too late. Code of Practice, art. 333. 8 La. 589.

If it had been pleaded by the defendants, the testimony shows that, under the laws of the State of Pennsylvania, the bank had ceded all its property, with a few trifling exceptions made to prevent the forfeiture of its charter, to trustees for the payment of its debts. This was, in effect, a technical insolvency of the bank. It had previously been in an insolvent state; and by this act, it placed all its property beyond its control, and attempted to create preferences on the real estate situated in this State, which are considered as a fraud upon the rights of the plaintiff, and are forbidden by our laws. In *Atwell v. Belden*, (1 La. 504), this court says: "The fact of insolvency being established by the evidence of the case, we consider the situation of the debtors as analogous to that of persons who make a ces-

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sion of their property to their creditors, from which the legal consequence is, that all debts may be exacted, as well as those which had time granted for their payment, as those actually payable." In the case now before the court, as in *Atwell v. Belden*, the objects of the suit were to obtain a judgment, and the evidence received without objection authorises one, against the defendants; and also for a privilege on the property situated here, and fraudulently conveyed by the defendants.

The court erred in deciding that a demand of payment of the bonds and *coupons* was necessary, before the plaintiff could bring suit on them. The bonds are payable generally, "in London." As to them, no decision has ever gone so far as to consider a demand necessary. The *coupons* are made payable at the office of F. Kuth & Co., in London. No demand was necessary as to these, because this court has always considered that the clause in every obligation, whether negotiable or otherwise, stating that payment is to be made at a particular place, is to be interpreted, agreeably to our system of jurisprudence, which fixes the domicile of the debtor for the place of payment (Civil Code, art. 2153), as a condition precedent, created by the parties, making the obligation conditional, which would otherwise be absolute. This rule of interpretation as to the obligations flowing from the contract, has never been applied by this court to any other contracts than such as were made in this State and were to be executed here, or to such as were made elsewhere, or to be executed elsewhere, and where there was no proof of the *lex loci contractus*, or of the *lex loci solutionis* being different from the law of this State. 3 Mart. N. S. 423. 10 La. 552. 12 Ib. 472. 14 Ib. 181. 15 Ib. 242. 1 Rob. 84, 311. 3 Ib. 395.

Whether this demand is necessary or not, does not depend on the *lex fori*, but on the *lex loci contractus*, or the *lex loci solutionis*. Story on Bills, pp. 141, 152, 157-9. In this case the law of Pennsylvania, where the bonds and *coupons* were made, and of England, where they were to be paid, are in evidence, and demand is not required by either law. 2 Watts & Sergeant's Rep. 462. 7 Watts' Rep. 382. Chitty on Bills, pp. 639, 396. 3 Kent's Com. p. 100.

If demand were otherwise necessary, it could not be required by reason of the insolvency of the bank, of the Pennsylvania assignments, of there being no funds at the place of payment as the *coupons* matured, of the possession and ownership by Kuth & Co. of the bonds and *coupons* when several of the latter matured, and of the demand and refusal of the bank at Philadelphia. It cannot be maintained that the Philadelphia assignments can validly transfer land in this State. If the objection could have been taken, that a distinct suit should have been brought to annul the transfer to Frazier, it was waived by the intervention of the trustees, and by the validity of the assignments being put at issue on the merits by the pleadings and the evidence.

T. Slidell, for the defendants and intervenors.

If it should be said that the assignments gave preferences—that this was an interest in real estate, and should be tested by our laws, we reply that the plaintiffs have no right to treat the assignment as null—they should have instituted a revocatory action. They cannot proceed by attachment and garnishment, and so try the validity of the assignment. See the cases cited in Benjamin and Slidell's Digest, Insolvency, K.

Moreover an revocatory action cannot be carried on by way of garnishment. Such a proceeding cannot be substituted for a direct revocatory action. *Taylor v. Whittemore*, 2 Rob. 99.

In this case had the revocatory action been instituted, it would have been barred by the prescription of one year.

This action is evidently untenable so far as regards the bonds sued upon.

Even in case of a Louisiana contract, a debt payable at a future day does not mature by effect of law, except in case of *technical* insolvency, and even then the creditor comes into the *concurso pro rata*, and is not permitted, as is sought in this case, to lay hold of the property entirely for his own benefit.

No principle exists in the law of Pennsylvania, or of England, which creates this anticipated maturity.

As regards the *coupons* or interest warrants, the plaintiff has not made out the case, because they have not proved a demand at the office of Kuth & Co., where the warrants were specially

made payable by their very terms and by the body of the bond. This court has uniformly held that such presentment is indispensable, and has refused to change its opinion, in spite of the decision of the Supreme Court of the United States and of other tribunals.

In the case in 1 Rob. 311, the court reiterating this familiar principle, also intimated that the matter is one pertaining to the remedy, and to be governed by the *lex fori*. "If it were shown to be a rule of evidence in that State, it would still be questionable whether it would authorize us to disregard the settled jurisprudence of our own State, which is that whenever a note is made payable at a particular place, payment must be demanded there before a recovery can be had on it." See also the decision of the court in *Buckner vs. Watt*, 19 La. 217.

But if this be not a question to be determined by the *lex fori*, but by the *lex loci contractus*, then the law of England governs the matter, and not the law of Pennsylvania, because the contract was to be performed in England. *Lapice v. Smith*, 13 La. 92.

Now by the law of England, a demand at the place designated for payment of the note, is necessary.

It was so held by the House of Lords in *Rowe v. Young*. See Byle on Bills of Exchange, p. 125. In consequence of this decision, parliament passed the act of 1 and 2 Geo. 4, c. 78, by which it is declared, that an *acceptance*, payable at a particular place, is a general acceptance, unless expressed to be payable there only, and not otherwise or elsewhere. But this statute, says Byle, p. 126 (Law Library, vol. 16), does not extend to promissory notes. If therefore a note be in the body of it made payable at a particular place, it is still necessary to aver and prove presentment thereof.

It has been attempted to be shown in this case that the bank had no funds at the place designated. The plaintiff partly relies on the evidence of the assignments. But those assignments did not cover the property in Europe. He also relies on the evidence of Frazier and of Burnley. What these witnesses state is merely as to their impression and belief. This is not evidence. Their testimony is so insufficient as to require no comment.

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The same may be said of the attempt to show that Kuth & Co. were holders of some of the warrants at maturity. It is mere evidence of belief and hearsay evidence.

But though there were sufficient proof that there were no funds deposited at the place of payment, where is the rule of law in England that this excuses demand? The rule exists there as to bills of exchange, but we do not find any such rule as to promissory notes.

MARTIN, J. The plaintiff is appellant from a judgment of non suit on his claim for \$48,400 and interest, the amount of ten post-notes of the defendants, neither of which is as yet payable. It has been, however, contended, that the bank is notoriously insolvent, and that, therefore, the debts which it owes are all exigible. The first judge has, in our opinion, correctly held, that an actual bankruptcy or *cessio bonorum*, either voluntary or forced, alone has the effect of rendering immediately exigible debts which have not yet matured by the lapse of the time stipulated in the contract, or the happening of the contingency on which the parties agreed that they should become immediately payable. Civil Code, art. 2049. 8 La. 585. As to the interest, which was payable semi-annually, and at a particular place in London stated in the *coupons*, the judge has conformed himself to the jurisprudence of this court, which is, that when a debt is made payable at a particular place, a demand by the creditor there is a condition precedent, which must be complied with, before the institution of any suit. 12 La. 473.

The plaintiff has attempted to justify his preceeding on the *coupons*, by the introduction of a witness stating circumstances which authorize it. But this gentleman has not mentioned any thing tending that way, from his personal knowledge.

Judgment affirmed.

 Succession of Gourjon — O'Duhigg and others, Appellants.

10r	541
47	1452
10r	541
108	507

SUCCESSION OF JACINTHE GOURJON—AUSUSTE O'DUHIGG, and others, Appellants.

A testator appointed two persons as his executors, and named two others, A. and B., to replace them, in case of the death or absence of the former, leaving a certain sum to each of those who might discharge the duties of executor. One of the persons first named having died, A. applied to be appointed executor in his place, which was opposed by B., who claimed the appointment. A. obtained a dismissal of his application as in case of non-suit; and a judgment was rendered refusing to appoint B., from which the latter appealed, citing A. as appellee. Pending this appeal, A. renewed his application to the Probate Court, and was appointed executor; and from this judgment no appeal was taken. The first named executor and A. having administered on the estate, afterwards filed a tableau of distribution, by which one of the sums bequeathed to the acting executors was allowed to A., and this tableau was homologated by the Probate Court. A decision being subsequently rendered on the appeal of B., by which the latter was declared to be entitled to the appointment of executor, a rule was taken by him in the Probate Court on A., and on the first named executor, to show cause why the legacy should not be paid to him, B. The rule was made absolute, and the judgment affirmed on appeal.

The services of counsel employed to obtain the appointment of a person as executor, are to be paid by the applicant, and not by the estate, whether the application succeed or fail.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Blache, for Cavelier.

L. Janin, for the appellant O'Duhigg.

Roselius and *P.^r A. Bernard*, appellants, *pro se*.

BULLARD, J. The facts which gave rise to this controversy may be seen by referring to the case of the *Succession of Gourgon—E. L. Bernard, Appellant*, decided in April, 1844. 7 Rob.

It now appears that while Bernard was prosecuting his appeal from the judgment of the Probate Court refusing to appoint him executor, on the ground that he had gone into bankruptcy, and O'Duhigg, his competitor, was before us as appellee, the latter renewed his application to be recognized as executor, and succeeded in the Court of Probates. From that judgment no appeal was prosecuted. The consequence was, that O'Duhigg was acting as executor, in virtue of a judgment having the force of the thing adjudged, and Bernard was appointed by the

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appellate court contradictorily with O'Duhigg. This state of things was not a little embarrassing, and led to the question which this case now presents, to wit, which of the two is entitled to the legacy of \$1500, given by the will to each of the two acting executors, Cavelier, the other executor, being incontestably entitled to one of the legacies.* The *tableau*, made out by Cavelier and O'Duhigg, awarded the legacy to O'Duhigg, but, on a rule afterwards taken by Bernard, the *tableau* was amended, and the legacy decreed to the latter, under the appointment of the Supreme Court. From that judgment O'Duhigg prosecutes this appeal.

It is clear that the merits of the original controversy cannot be gone into in this case. Each has a judgment of a competent tribunal in his favor, pronounced contradictorily with his adversary. It would, perhaps, have been more regular if Bernard had appealed from the judgment appointing O'Duhigg; but the effect would have been the same, because that judgment would have had its effect pending the appeal, and the same difficulty would have occurred in disposing of the legacy, which is the great bone of contention, the administration of the estate being in perfectly safe hands. It is said by O'Duhigg, or his assignee, in his answer to the rule taken on him by Bernard, that the judgment of the Supreme Court was an *ex parte* judgment, to which neither he, nor the succession of Gourjon was a party. This assertion is contradicted by the record, from which it appears not only that O'Duhigg was personally cited as appellee, but that he attempted to make himself a party in his capacity of executor, in virtue of the proceedings subsequently carried on in the Court of Probates; and we held in that case, that it was not necessary to make the succession a party, in a controversy between two persons contending for its administration. As soon

* The clause of the will referred to, is in the following words: "Je nomme pour mes exécuteurs testamentaires en ce qui concerne les biens à la Nouvelle Orleans, Messieurs S. et C.; et en cas de décès ou d'absence, je nomme pour remplacer Messieurs O. et B. Je les prie de vouloir me rendre ce service, ainsi que d'agréer comme témoignage de ma gratitude une somme de quinze cents piastres, que je donne et lègue à chacun de ceux qui rempliront cette charge, pour les dédommager de leurs peines et soins."

Thornhill v. Christmas.

as that judgment was pronounced, it was conclusive upon O'Duhigg, and in the last resort. The court, therefore, did not err in awarding the legacy to Bernard. The homologation of the account filed by the executors, is not conclusive upon Bernard.

There is another appeal, by C. Roselius and P. A. Bernard, the attorneys of E. L. Bernard, from a judgment overruling their pretensions, to be paid for their professional services in obtaining the appointment of Bernard out of the estate. We concur with the court in the opinion, that such services are to be paid by the applicant, and not by the succession. If they had failed, they would still have been entitled to a fee, but surely not chargeable upon the estate.

Judgments affirmed.

JOHN THORNHILL v. RICHARD CHRISTMAS.

Since the act of the 28th March, 1840, ch. 117, abolishing imprisonment for debt, no order of arrest can be legally issued after judgment. The arrest still authorized is merely a conservatory measure, for the purpose of securing the appearance of the defendant. Arts. 212, 214 of the Code of Practice, amended by the second section of the act of 28th March, 1840, ch. 117, relate only to the arrest of the defendant at the institution of the suit.

The security in a bond taken under a writ of arrest cannot be made liable, where the writ was illegally issued.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. The plaintiff having obtained a judgment against Christmas upon the record of a former judgment recovered in the State of Mississippi, made affidavit that the debtor was about permanently to depart from the State without leaving in it sufficient property to pay his debt, and that he did not take the oath for the purpose of vexing him, but only for the purpose of securing his demand, and obtained an order of arrest. Harrison became the surety of the defendant in his bond, conditioned that he should not leave the State within three months from its date, in conformity to the provisions of the act of 28th March, 1840, entitled "An act supplementary to an act entitled

Derby and another v. Boyd. Parker and another v. Barnard and others.

an act to abolish imprisonment for debt." See B. & C.'s Dig. 475, No. 16, sec. 1.

A writ of *feri facias*, issued against the original debtor, having been returned *nulla bona*, the plaintiff took a rule upon the surety, and on proof that the defendant went out of the State within the three months, judgment was rendered against him, and he has appealed.

The counsel of the appellant contend, that the act of the legislature of 1840, having abolished the writ of *capias ad satisfaciendum*, no order of arrest can be legally issued after judgment rendered, as a means of coercing the payment of the judgment; that this would amount, in substance, to the very writ abolished; and that the arrest still authorized by law is merely a conservatory measure, and with a view of securing the appearance of the defendant; that the articles 212 and 214 of the Code of Practice, amended by the act of 1840, section 2d, (See Digest, 472), relate only to the arrest of the defendant at the institution of the suit, with a view of securing the payment of the judgment which the plaintiff *expects to obtain* in the suit he *intends to bring*, and that the writ issued after judgment is nothing more than a *capias ad satisfaciendum* in disguise.

This is, in our opinion, the true construction of the statute. The writ issued improvidently, and the defendant is not liable as surety on the bond. The judgment of the Commercial Court is, therefore, reversed, and ours is that the rule be discharged, with costs in both courts.

Kane, for the plaintiff.

E. C. Mix and *Elwyn*, for the appellant.

In the cases of *Freeman Derby and another v. J. Chauncey Boyd*, from the Commercial Court of New Orleans, and *James C. Parker and another v. Barnard and others*, from the District Court of the First District, the judgments below were affirmed on appeal, in New Orleans, with damages, during the period embraced by this volume.

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ACCESSION.

Where it is shown that the boundary lines of the land claimed by one holding under a confirmation by the United States and a survey made by a government surveyor, were run as near as possible to a bar, the whole of which was subject to be overflowed at high water and the greater part of it to an annual overflow, so as to include all the high land susceptible of ownership, the proprietor will be entitled to the alluvion, or batture, subsequently formed on the site of the bar. *Stephenson v. Goff*, 99.

ACT, AUTHENTIC.

Where it does not appear from a paper offered in evidence, purporting to be a copy of an authentic act, that the original was signed by two witnesses, it cannot be admitted in evidence as the copy of an authentic act. An act is not authentic which wants the signature of either of the witnesses required by article 2231 of the Civil Code. *Thomas v. Kean*, 80.

ADMINISTRATOR.

SEE SUCCESSIONS, III.

ADMISSION.

SEE EVIDENCE, 85. PLEADING, 5.

AGENCY.

1. The cashier of the branch of a bank, may, as an act of administration, accept the surrender of a debtor of the bank, and vote for a syndic ; but without an express and special authority from the directors, he cannot discharge the insolvent. The granting of such a discharge is an act of ownership, and not of administration. C. C. 2965, 2966.

Union Bank of Louisiana v. Bagley, 43.

2. In an action on a policy of insurance, effected on account of the plaintiffs by an agent, testimony to prove that the latter, who had a policy for his own ben-

effit on goods in the same building, designedly set fire to the building, is inadmissible, where it is neither alleged nor proved that they were in any way privy to the act. The act can no more affect the plaintiffs than if done by a stranger. A principal is liable civilly for the frauds or misrepresentations of his agent, made in the course of his employment, though he neither authorized, justified, nor participated in his misconduct, nor even knew of it; but the misconduct, or misrepresentation on the part of the agent, must be while acting as such, within the scope of his agency. Nor will the record of a suit between the agent and the defendants, on his own policy, be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiffs in the action in which it is offered in evidence. The fraud and false swearing on the part of the agent, being in his own case and for his own purposes, was irrelevant; and the principals not being a party to the suit, the matter was *res inter alios acta*, and cannot be used against them.

Henderson v. Western Marine and Fire Insurance Company, 164.

3. When an agent, by whom insurance had been effected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized and acted when he effected it, and not as proof of perjury. *Ib.*
4. The release of a debtor is an act of ownership, which the cashier of a bank is not authorized to do, under his general administrative powers. *Commissioners of the Clinton and Port Hudson Rail Road Company v. Kernan—Re-hearing*, 176.
5. An agent may be a witness in all cases, except in suits against the principal on account of the negligence of the agent. In such cases, he cannot be a witness for the principal. *Ducros v. Jacobs*, 453.
6. Where an agent of a third person, believing himself authorized as such to sell certain property of his principal, receives from a purchaser, who also believed that he was authorized to sell, a part of the price, which was paid over to the principal, the purchaser, on discovering the want of authority in the vendor, may recover from the principal the amount so received by him, and this, though a balance may be still due by the agent to the principal, after crediting the former with the amount paid over by him. Art. 2134 of the Civil Code does not apply to such a case. *McDonogh v. Delassus*, 481.
7. An agent is bound to deliver to his principal whatever he has received by virtue of his procuration, though unduly. C. C. 2974. *Ib.*
8. The relation of principal and agent is not that of debtor and creditor from the moment that the agent receives money or property for the principal. It is a trust; and does not give the agent any title to the money or property so received, which would be the case if he were regarded as a debtor. The agent may become a debtor of the principal, but not until the dissolution of the contract of agency, and his neglect or refusal to account and deliver over the funds or property. While the agency continues, the property or money in the hands of the agent belongs to the principal, the agent being a mere trustee. *Ib.*
9. An agent is a competent witness for his principal, in an action against the latter to recover a sum of money, alleged to have been paid to the agent through

error, and admitted to have been paid by him to his principal. The witness is indifferent, being responsible to one or the other party for the amount in controversy.

McDonogh v. Delassus—Re-hearing, 489.

10. An attorney in fact defending an action on behalf of his principal, unless specially empowered, cannot, by any allegations or confessions in the judicial proceedings, renounce or abandon any of the rights of his principal.

Prevost v. Martel, 512.

AMENDMENT.

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APPEAL.

- I. *From what Judgments an Appeal will lie.*
- II. *Parties to Appeal.*
- III. *Citation.*
- IV. *Effect of Appeal.*
- V. *Record of Appeal.*
- VI. *Costs of Appeal.*
- VII. *Surety on Appeal Bond.*

I. *From what Judgments an Appeal will lie.*

1. An appeal will lie from a judgment on a reconventional demand, where the amount claimed in reconvention is sufficient to give jurisdiction to the Supreme Court, though the original demand, being under three hundred dollars, no appeal could be taken from the judgment on it. In such a case, the judgment on the demand in reconvention will alone be examined on the appeal.

Hanna v. Bartlette, 438.

II. *Parties to Appeal.*

2. The first section of the act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy, having declared that the benefit of the act shall not be extended to any one owing debts in consequence of a defalcation as a guardian, a tutor, against whom a judgment has been rendered for an amount due to the minors under his care, and who subsequently applied to be declared a bankrupt and was discharged as such, not being protected by the proceedings in bankruptcy, may afterwards appeal from the judgment rendered against him. His assignee should not be made a party to the appeal.

Collins v. Marshall, 112.

3. Where a judgment has been rendered in favor of the plaintiffs, in a revocatory action to rescind a sale on the ground of fraud and simulation, and the vendor

alone appeals from the decision, the vendee must be cited as an appellee, or the correctness of the judgment cannot be inquired into, and the appeal must be dismissed. So the latter should be made an appellee, where the judgment having been against the plaintiffs, the latter appealed.

Hyde v. Craddick, 387.

III. Citation.

4. Under the first section of the act of 22d March, 1843, where a party applies for an appeal, by motion in open court, at the same term at which the judgment appealed from was rendered, no citation, or other notice to the appellee, is necessary, but where the appeal is applied for at a subsequent term citation is necessary, as the other party cannot be supposed to be then in attendance.

McCollam v. Police Jury of Pointe Coupée, 20.

5. Want of citation of appeal will be cured, where the party appears and contests the case on any other ground than the want of citation.

Dunbar v. Owens, 139.

6. It is too late after all the parties are actually before the court, to move to dismiss the appeal on the ground that citation was not served within the time prescribed by law. *Ib.*

IV. Effect of Appeal.

7. Where a plaintiff who has obtained a judgment below, in a case depending before the Supreme Court on a suspensive appeal, represents that his judgment has been recorded in the mortgage office, and swears that he apprehends that the defendant will conceal, or dispose of, pending the appeal, a slave, on whom he has a mortgage resulting from the recording of the judgment, he may obtain a sequestration from the lower court. C. P. 275. Act 7 April, 1826, s. 9. The appellee is not confined to his recourse on the surety in the appeal bond.

Fink v. Martin, 147.

8. As a general rule, the jurisdiction of the appellate court attaches as soon as the appeal bond is filed, and the lower court has no longer authority to take any steps but such as may be necessary to transmit the record to the Supreme Court, or, by a provisional and conservatory order, to secure the ultimate execution of the judgment of the appellate court. *Ib.*

9. The jurisdiction of the Supreme Court attaches as soon as the appeal bond is filed, and the citation of appeal has been issued; and the court of the first instance can take no further steps in the case, except such as may be necessary to transmit the record to the Supreme Court. C. P. 883.

Harbour v. Brickel, 419.

V. Record of Appeal.

10. Where a bill of exceptions is insufficient to enable the court to test the correctness of the decision of the inferior tribunal, its judgment will be presumed to be correct. *Thomas v. Kean*, 80.
11. A party who offers the records of other suits in evidence on the trial in the

lower court, is bound to file transcripts of them, at least on being apprised of an appeal, or on being required to do so. Where such transcripts, not having been filed below, could not be included in the record of appeal, the appellant will be entitled to a *certiorari*; and, in case the appellee should not file them after the writ has issued, the case will be remanded for a new trial.

Hyde v. Craddick, 387.

12. The time allowed for the return day of an appeal cannot be extended by the court from which the appeal was taken, but only by the Supreme Court; and on the failure of the appellant to file the transcript, or to apply to the Supreme Court, within three judicial days after the return day, for an extension of the time, the appellee will be entitled to an execution, under art. 589 of the Code of Practice. *Harbour v. Brickel*, 419.

VI. Costs of Appeal.

13. An appellee cannot, by entering in the Supreme Court a *remittitur* of a sum incorrectly allowed by the court below as special damages, throw the costs of the appeal on the appellant. *Rhodes v. Skolfield*, 131.

VII. Surety on Appeal Bond.

14. Sureties on an appeal bond are liable only where it is shown, that there is not sufficient property of the debtor to satisfy the execution. C. P. 596. This fact can be proved only by the return of the officer, charged with the execution of the judgment, showing a compliance with all the requirements of the law. A return that no property was found, and that no demand was made of the debtor because he could not be found, without showing that any demand was made of the plaintiff in execution, his agent, or counsel, is insufficient to render the sureties liable. C. P. 726, 727. *Lynch v. Burr*, 136.
15. No proceedings can be had against the sureties on an appeal bond, where the *fi. fa.* against the debtor was returned into court before the return day. *Per Curiam*: Had the execution remained longer in the hands of the officer, he might have found property. At all events, the surety is entitled to the advantage of every legal delay. *Ib.*
16. Where a suspensive appeal, taken from a judgment recovered in a lower court and recorded in the mortgage office, leaves the judgment unreversed, the plaintiff will be bound to urge any right he may have acquired on the property of the debtor by the recording of his mortgage, before resorting to the surety on the appeal bond. C. P. 579. *Turner v. Parker*, 154.
17. From the nature and terms of the obligation of the surety in an appeal bond, no recourse can be had against him where property belonging to the mass of the creditors of the appellant, subject to certain privileges and mortgages, is yet unsold. It must in such a case be shown by the creditor, that the sale of all the effects of the principal has proved insufficient to discharge his demand. C. P. 579, 596. Act 20 March, 1839, s. 20. But where it is proved that the appellant had been declared a bankrupt under the act of Congress of 1841, and that his estate, though in course of administration, is in such a situation as to afford no reasonable ground to expect that any dividend will ever be paid to

the suing creditor, he will not be bound to await the final liquidation of the bankrupt's estate, before proceeding against the surety on the appeal bond.

Flower v. Dubois, 191.

ARREST.

1. Though a writ of arrest may have been illegally obtained, the clerk who issued it, and the sheriff who executed it in obedience to the mandates of a competent tribunal, cannot be viewed as co-tresspassers with the plaintiff in the suit, who alone is responsible for the consequences of the proceeding.

Driggs v. Morgan, 119.

2. In an action for damages for a malicious arrest, evidence is admissible to prove the condition of the apartment in the jail in which plaintiff was confined. *Ib.*

3. Where one sued for damages for a malicious arrest, is not shown to have acted through malice, but to have had reasonable grounds to believe that he would succeed in his action, and no attempt was made to disprove the affidavit upon which the arrest was obtained, the case will be remanded for a new trial, where the damages allowed by the jury appear excessive. *Ib.*

4. Since the act of the 28th March, 1840, ch. 117, abolishing imprisonment for debt, no order of arrest can be legally issued after judgment. The arrest still authorized is merely a conservatory measure, for the purpose of securing the appearance of the defendant. Arts. 212, 214 of the Code of Practice, amended by the second section of the act of 28th March, 1840, ch. 117, relate only to the arrest of the defendant at the institution of the suit.

Thornhill v. Christmas, 543.

5. The security in a bond taken under a writ of arrest cannot be made liable, where the writ was illegally issued. *Ib.*

ASSIGNMENT.

The holder of a warrant, drawn by the auditor on the treasurer of a parish, for a certain sum, cannot assign a part of it, without the consent of the parish authorities. The latter are not bound to pay their debts by portions; nor will they be bound, though a draft for the part assigned was accepted by the treasurer, if he was not authorized to do so. *LeBlanc v. Parish of East Baton Rouge*, 25.

ATTACHMENT.

A judgment in favor of B. against L. having been affirmed on appeal, the former, under the act of 1839, propounded interrogatories to S. & J., who had been L.'s security on his appeal bond, who answered that they were not indebted to the latter, but had in their possession effects belonging to him, deposited with them as collateral security against any liability they might be subjected to as his factors, or securities, &c. T., a creditor of B.'s, having attached the judgment in favor of the latter, against whom he had not yet obtained judgment, took a rule in his suit against B., on the latter, on L., and on S. & J. to show cause why the effects mentioned in the answer of S. & J. to the interrogato-

ries propounded in the first suit, should not be delivered to the sheriff to be sold, and the proceeds applied to the satisfaction of the judgment in favor of B., but deposited in court subject to its future order. *Held*, that S. & J. could not be proceeded against by a rule taken in the suit against B., to which they were strangers; and that, had they been made garnishees therein, no judgment could be obtained against them, before judgment had been rendered against B., and then only as to the effects belonging to the latter; and that the effects in their hands belonged to L., not to the debtor of T.

Lynch v. Burr, 136.

ATTORNEY AT LAW.

The services of counsel employed to obtain the appointment of a person as executor, are to be paid by the applicant, and not by the estate, whether the application succeed or fail. *Succession of Gourjon*, 541.

BAIL.

1. A parish judge or justice of the peace before whom a party is brought for examination, cannot admit him to bail, if the crime of which he is accused be "punishable with death, or with seven years or more imprisonment at hard labor." Act 3 May, 1805, sec. 13. *State v. Hébert*, 41.
2. A bail bond taken by a magistrate in a case in which he is prohibited by law from admitting the party to bail, is void; and the State cannot recover on it. *Ib.*

BANK.

1. The agreement entered into by the presidents of certain banks in New Orleans, on the 18th of August, 1841, for the purpose of guarantying the circulation of the banks represented by them, by which they bound themselves to contribute, in proportion to the circulation of each bank, as authorized by a resolution of the presidents of the 6th April, 1840, for the relief of any one of the number which might be unable to pay or secure the checks drawn on it for the weekly balances, was founded on a good consideration, and is obligatory. The resolution created a several, not a joint obligation, each bank agreeing to contribute in the ratio of its circulation to that of the circulation of all the banks.
Commissioners of the New Orleans Improvement and Banking Company v. Citizens Bank of Louisiana, 14.
2. A bank in liquidation under the act of 14th March, 1842, cannot be sued before any other court than that under the direction of which it is being liquidated. Sec. 8. *Ib.*
3. The cashier of the branch of a bank, may, as an act of administration, accept the surrender of a debtor of the bank, and vote for a syndic; but without an express and special authority from the directors, he cannot discharge the insolvent. The granting of such a discharge is an act of ownership, and not of administration. C. C. 2965, 2966. *Union Bank of Louisiana v. Bagley*, 43.
4. The legal interest on a sum discounted by a bank, is that established by its charter. C. C. 2895. *Commissioners of the Clinton and Port Hudson Rail Road Company v. Kernan*, 174.

5. The release of a debtor is an act of ownership, which the cashier of a bank is not authorized to do, under his general administrative powers.
Ib.—Re-hearing, 176.
6. Where one having money on deposit in a bank becomes indebted to it by the maturity of a note executed by him and held by the bank, compensation will take place, and the debts extinguish each other to the amount of the smaller of the two. *Bank of Louisiana v. Fowler*, 196.
7. There is a strong analogy between the *cessio bonorum* of an insolvent and the administration of the surrendered property by his syndics, and the liquidation of banking corporations, by commissioners, under the acts of 14 and 26 March, 1842. In both cases, the property vests, in effect, in the creditors, and the former owner has no longer any right or interest, but that of receiving the *residuum* after the payment of all the debts, and, for that purpose, of coercing a final settlement by the commissioners. Neither the insolvent debtor, nor the stockholders of the insolvent corporation, can appear in court to control the administration of the assets. *Mudge v. Commissioners of the Exchange and Banking Company of New Orleans*, 460.
8. The legislature have power to provide for the distribution among the creditors of the property of insolvent corporations, whose charters have been forfeited; and the acts of 14 and 26 March, 1842, for the liquidation of banks, are insolvent laws applicable to such corporations. *Ib.*

BANK OF LOUISIANA.

Under the 17th sect. of the act of 7th April, 1824, incorporating the Bank of Louisiana, which declares that if the bank "shall, at any time, suspend or refuse payment, in current money of the United States, of any of its notes, bills or obligations, or of any moneys received upon deposit, the holder of any such note, bill or obligation, or the person entitled to demand and receive such moneys, shall be entitled to interest thereon from the time of such suspension or refusal until the same shall be fully paid, at the rate of twelve per cent per annum," the holder of a claim can recover interest at that rate only from the time of a demand, or from the period when the bank was in default, and not from the date of a general suspension of specie payments, without such demand. This section does not apply to claims by a stockholder for dividends due by the bank. It was intended to provide for the public dealing with the bank, and not for the stockholders *inter se*. The legislature never intended to subject the stockholders to such a penalty towards each other, for not paying their dividends in specie. *Bank of Louisiana v. Fowler*, 196.

BANKRUPTCY.

1. The first section of the act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy, having declared that the benefit of the act shall not be extended to any one owing debts in consequence of a defalcation as a guardian, a tutor, against whom a judgment has been rendered for an amount due to the minors under his care, and who subsequently applied to be declared

abankrupt and was discharged as such, not being protected by the proceedings in bankruptcy, may afterwards appeal from the judgment rendered against him. His assignee should not be made a party to the appeal.

Collins v. Marshall, 112.

2. One discharged as a bankrupt under the act of Congress of 19 August, 1841, who subsequently promises to pay a debt from which he was released by the bankrupt proceedings, will be liable on his promise. *Blanc v. Banks*, 115.
3. The 14 section of the act of Congress of 19 August, 1841, establishing an uniform system of bankruptcy, which declares, "that where two or more persons, who are partners in trade, become insolvent, an order may be made," declaring them bankrupts, "in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and all the separate estate of each of the partners, shall be taken," with certain exceptions, "and that the creditors of the company, and the separate creditors of each partner shall be allowed to prove their respective debts," &c. applies to the case of a partner in an existing partnership. It does not apply where the partnership had been dissolved previously to the application to be declared a bankrupt, made by one of its members who had been charged with the liquidation of the debts of the firm. In such a case the interest of the applicant alone vests in his assignees. *Akin v. Oakey*, 410.
4. An actual bankruptcy or *cessio bonorum*, either voluntary or forced, alone has the effect of rendering immediately exigible debts not matured by the lapse of the time stipulated in the contract, or by the happening of the contingency on which the parties agreed that they should become payable. The mere fact of the insolvency of the debtor does not produce such an effect. C. C. 2049. *Funes y Carillo v. Bank of United States*, 533.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Acceptance.*
- II. *Transfer.*
- III. *Presentment for Payment, and Protest.*
- IV. *Release of Parties.*
- V. *Promise to Pay after Discharge.*
- VI. *Pleading and Evidence in Actions on Bills and Notes.*
- VII. *Prescription of Notes.*

I. *Acceptance.*

1. Where a bill is payable at a certain time after date, it is not absolutely necessary to have it accepted, an acceptance being only necessary to fix the period of payment, where a bill is payable at sight, or at so many days after sight or demand, or after a certain event. It will suffice that a demand be made of the drawee at maturity, and notice given to the drawer in case of their default. *Commercial Bank of Natchez v. Perry*, 61.

II. *Transfer.*

2. One who receives a note, with knowledge of an agreement between the original holder and the endorsers, that but one-fifth of the amount should be paid at maturity, a new note being given for the balance, will be bound by the stipulation. *Bush v. Wright*, 23.
3. A note not negotiable, in the hands of a third person, is subject to all the equities and defences which might have been opposed by the maker against the payee. *Gilmore v. Destréhan*, 521.

III. *Presentment for Payment, and Protest.*

4. Where a notice of protest to an endorser of a note, deposited in a post office in the parish of his residence, is addressed to him in that parish, *via* a post office in an adjoining parish, the latter being the nearest to his residence, the insertion of the word *via* will not render the notice bad. *Per Curiam*: The word *via* does not necessarily raise the presumption that the notice was forwarded to another office than that, to the name of which it was prefixed. It was, doubtless, intended as a direction to the post master at the office in which the notice was deposited, to send it to the party through the office to which it was prefixed, which was the nearest to his residence, though out of the parish; and as the post master at the latter place could not send it to any office nearer to his residence, the probability is that he kept it, according to the evident intention of the writer. *New Orleans and Carrollton Rail Road Company v. Ratliff*, 37.
5. Where a bill drawn on a commercial partnership, is accepted, after the dissolution of the firm, by one of the partners, payable at a particular bank, but he is not shown to have been authorized by his former partners to bind the firm, and demand of payment was made only at the bank, no demand having been made of the drawees, the drawer will be discharged.

Commercial Bank of Natchez v. Perry, 61.

IV. *Release of Parties.*

6. An accommodation endorser of a note will be discharged by any agreement between the holders and one of the drawers, amounting to a novation of the debt (C. C. 2194), or by which a prolongation of the term of payment is accorded to the latter. *Ib.* 3032. *Gustine v. Union Bank of Louisiana*, 412.
7. Where the legal effect of an agreement between the holder and one of the drawers of a note was to release an accommodation endorser, the rescission of the agreement may revive the original obligation of the drawer who was a party to it, but cannot revive that of the endorser, who was not a party thereto. C. C. 2038, 2040, 2041.
8. No reservation in a contract by which the holder of a note agrees to an extension of time in favor of the drawer, can prevent the discharge of an accommodation endorser, not a party to the contract. *Per Curiam*: The reservation is inconsistent with the very agreement containing it. While the agreement releases the principal debtor from a compliance with his original obliga-

tion, the reservation has for its object to insist upon its performance by the endorser. *Ib.*

V. *Promise to Pay after Discharge.*

9. Proof that the endorser of a note, who had been discharged by illegality in the protest, subsequently solicited and obtained indulgence from the holders, will not render him liable, unless it be also shown that he was aware, at the time of the application, of the circumstance which liberated him.

Bank of Louisiana v. Holmes, 40.

10. A promise to pay the amount of a bill, made by the drawer, after discharge in consequence of want of demand of payment of the drawees, will not be binding, unless it be shown that he was aware of his discharge at the time of the promise. *Commercial Bank of Natchez v. Perry*, 61.

VI. *Pleading and Evidence in Actions on Bills and Notes.*

11. Where the protest of a note and the notary's certificate of notice is offered in evidence, the opposite party cannot interrogate the notary as to whether the act offered is an original or a copy, and whether the act of record is signed by the witnesses named in the protest. *Per Curiam*: The act of the notary, such as it is presented, must have the effect it is entitled to, without any explanation by witnesses, or being eked out by parol evidence.

Bank of Louisiana v. Black, 59.

12. Where a protest offered in evidence in an action against the endorsers of a note, shows on its face that the note was protested in the presence of two witnesses, but that they did not sign that part of it which certifies the demand and refusal to pay, and the certificate attached, showing in what way the notices were served, appears to have been signed in the original by two witnesses, and the notary certifies a copy from his records, it is sufficient. *Ib.*

13. A note endorsed in blank, like one payable to bearer, may be sued on by any one in possession of it. *Skolfield v. Rhodes*, 128.

14. An allegation in a petition that a note was duly protested, is a sufficient averment of demand of payment. A special averment is not absolutely necessary. *Ducros v. Jacobs*, 453.

15. The plea of the general issue, in an action against the endorser of a note, throws upon the plaintiff the burden of proving all the facts necessary to a recovery, to wit: demand of the maker, protest, and notice to the endorser. *Ib.*

16. The written proof of notice of protest, provided by the act of 13th March, 1837, does not exclude parol evidence thereof. *Ib.*

17. A notary by whom the protest was made, is a competent witness, in an action against the endorser of a note, to prove notice to the latter. *Ib.*

18. The general rule is, that he who affirms must prove; but where a note payable to the payee personally, is on its face not negotiable, and the latter declares, in an agreement with the maker of the same date with the note, that the maker shall be bound to pay the same, only in the event of the payee's complying with two conditions, to wit, not endorsing a certain bond, and performing certain work, and the maker relies on a non-compliance by the

payee with the conditions of the agreement, it will, on the principle that a negative cannot be proved, be for the defendant to prove that the payee did endorse the note, and for the plaintiff to establish a compliance with the other condition, to wit, his performance of the work. *Gilmore v. Destréhan*, 521.

VII. Prescription of Notes.

19. Prescription runs against a note payable on demand from its date, not from that of the demand. *Per Curiam*: Prescription attaches to a right from the moment that it can be exercised. *Andrews v. Rhodes*, 52.
20. Defendant sued on a note without date, but bearing interest from a certain day, pleaded prescription, and the court, assuming that the note was made on the day from which it bore interest, gave judgment in his favor. *Held*, that the court erred in assuming that the note was made on the day from which it bore interest; and that defendant was bound to prove the facts from which relief was sought under the plea of prescription. *Ib.*

CITATION.

1. The insertion of the title of the suit in any part of the citation served on the defendant, in such a manner as to preclude any mistake, is a sufficient compliance with art. 179 of the Code of Practice, which does not prescribe that the title shall be inserted in any particular part of the citation.
Bank of Louisiana v. Elam, 26.
2. The return of a sheriff stating the manner in which a citation was served cannot be contradicted by evidence where that officer has not been called on to correct it. *Ib.*
3. The notification of the filing of the account and tableau of distribution of an executor, operates as a citation to all persons concerned, creditors as well as legatees; and the homologation of the account and tableau, bars all further enquiry as to all matters included therein. *Succession of Peytavin*, 118.
4. A citation headed as issued from "the District Court of the Fourth Judicial District for the parish of P. C." reciting that the action is pending before the said District Court, witnessed by the judge, and signed by the clerk of that District Court, and requiring the defendant to file his answer "in the office of the clerk of the court of the parish first aforesaid, at the court house," &c. is sufficient. *Per Curiam*: The defendant could not be mistaken as to the court before which he was called on to answer. *Driggs v. Morgan*, 119.
5. Want of citation of appeal will be cured, where the party appears and contests the case on any other ground than the want of citation.
Dunbar v. Owens, 139.
6. It is too late after all the parties are actually before the court, to move to dismiss the appeal on the ground that citation was not served within the time prescribed by law. *Ib.*

CLINTON AND PORT HUDSON RAIL ROAD COMPANY.

1. Neither the charter of the Clinton and Port Hudson Rail Road Company, (Acts of 7th Feb. 1833, 10th March, 1834, etc.) nor the by-laws of the Compa-

ny, conferred any authority on their cashier to release a debtor of the Company's by substituting another in his place. *Commissioners of the Clinton and Port Hudson Rail Road Company v. Kernan*, 174.

2. The provision of the 19th section of the act of 1834, relative to the Clinton and Port Hudson Rail Road Company, which declares, that the mortgages for stock and loans granted by virtue of that act, shall bear interest at the rate of ten per cent a year, after maturity, until paid, applies only to subscriptions for the part of the stock to be secured by mortgage. Under the charter, eight per cent is the rate of legal interest, arising *ex mora*, on a note given for money loaned. Sec. 8. *Ib.*

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. Civil Code.

II. Code of Practice.

I. Civil Code

- 180, 181. Responsibility of master for acts of slave. *McCargo v. The Merchants Insurance Company of New Orleans*, 234.
356. Prescription. *Gourdain v. Davenport*, 173.
495. Possession. *Laizer v. Generes*, 178.
- 586, 587. Usufruct. *Wimbish v. Gray*, 46.
- 1105 to 1111. Successions. *Valderes v. Bird*, 396.
1112. ————— *Succession of Duplessis*, 193. *Valderes v. Bird*, 396.
- 1113 to 1125. Successions. *Valderes v. Bird*, 396.
- 1148 to 1151. ————— *Succession of Ogden*, 457.
- 1155 to 1157. ————— *Valderes v. Bird*, 396.
1163. ————— *Succession of Ogden*, 457.
1468. Donations. *Succession of Bousquet*, 143.
- 1473, 1474, 1599, 1602, 1603. Donations. *Prevost v. Martel*, 512.
- 1664, 1665. ————— *Succession of Duplessis*, 193.
- 1697, 1700 to 1702. ————— *Prevost v. Martel*, 512.
- 1813, 1818. Contracts. *McRae v. Chapman*, 65.
1906. ————— *Hepp v. Commagère*, 524.
- 1945 to 1948. Interpretation. *Ross v. Garlick*, 365.
1953. ————— *Andrews v. Rhodes*, 52.
1967. Action to avoid Contracts. *Hyde v. Craddick*, 387.
1970. ————— *Ibid. Dumas v. Lefebvre*, 399.
- 1971, 1972. ————— *Dumas v. Lefebvre*, 399.
1989. ————— *Gates v. Legendre*, 74.
2016. Contracts. *Gilmore v. Destréhan*, 521.
2038. ————— *Gustine v. Union Bank of Louisiana*, 412. *Gilmore v. Destréhan*, 521.
- 2040, 2041. ————— *Gustine v. Union Bank of Louisiana*, 412.
2049. ————— *Funes y Carillo v. Bank of the United States*, 533.

- 2073, 2075. Contracts. *Commissioners of New Orleans Improvement and Banking Company v. Citizens Bank of Louisiana*, 14.
2080. ——— *Laurans v. Garnier*, 425.
2122. ——— *Hepp v Commagère*, 524.
2134. ——— *McDonogh v. Delassus*, 481.
2160. Imputation of payment. *Union Bank of Louisiana v. Kindrick*, 51.
2173. Insolvency. *Union Bank of Louisiana v. Bagley*, 43.
2194. Novation. *Gustine v Union Bank of Louisiana*, 412.
2204. Compensation. *Bank of Louisiana v. Fowler*, 197.
2205. ——— *Bagley v. Tate*, 45.
2231. Authentic act. *Thomas v. Kean*, 80.
- 2255, 2256. Evidence. *Bauduc v. Conrey*, 466.
2260. ——— *Ducros v. Jacobs*, 453.
2265. *Res judicata*. *Preston v. Slocomb*, 361.
2300. Responsibility of master for acts of slave. *McCargo v. Merchants Insurance Company of New Orleans*, 234.
- 2317, 2318, 2321, 2327, 2355. Husband and Wife. *Gates v. Legendre*, 74.
2363. Husband and Wife. *Wimbish v. Gray*, 46.
2367. ——— *Gates v. Legendre*, 74. *Turner v. Parker*, 154.
2371. ——— *Wimbish v. Gray*, 46.
2377. ——— *Babin v. Nolan*, 373.
2408. ——— *Gates v. Legendre*, 74.
2412. ——— *Sowell v. Cox*, 68.
2428. Sale. *Kohn v. Byrne*, 113.
2449. — *Clarke v. Lockhart*, 5.
- 2455, 2461. — *Laurans v Garnier*, 425.
2485. — *Laizer v. Generes*, 178.
2488. — *Skolfield v. Rhodes*, 128.
2599. — *McRae v. Chapman*, 65.
- 2683, 2684. Lease. *Bauduc v. Conrey*, 407.
2805. Interest. *Commissioners of Clinton and Port Hudson Rail Road Company v. Kernan*, 174.
2949. Judicial Sequestration. *Fink v. Martin*, 147.
- 2965, 2966. Agency. *Union Bank of Louisiana v. Bagley*, 43.
- 2971, 2973, 2974. ——— *McDonogh v. Delassus*, 481.
- 3006, 3032. Surety. *Gustine v. Union Bank of Louisiana*, 412.
- 3259, 3260. Mortgage. *Hubbard v. Griffin*, 383.
3287. Wife's mortgage. *Gates v. Legendre*, 74.
3367. Discussion. *Bagley v. Tate*, 45.
3416. Possession. *Laizer v. Generes*, 178.
- 3499, 3500. Prescription. *Davis v. Houren*, 402.
3501. ——— *Driggs v. Morgan*, 119.
3507. ——— *Laurans v. Garnier*, 425.
3508. ——— *Davis v. Houren*, 402.

II. Code of Practice.

- 47, 48, 49. Possessory action. *Bauduc v. Conrey*, 407.

73. Exception of discussion. *Bagley v. Tate*, 45.
 179. Citation. *Bank of Louisiana v. Elam*, 26.
 212, 214. Arrest. *Thornhill v. Christmas*, 543.
 269, 275, 279, 280, 283. Sequestration. *Fink v. Martin*, 147.
 296, 297. Injunction. *Sowell v. Cox*, 68.
 298. Injunction. *Gill v. Her Husband*, 28. *Sowell v. Cox*, 68.
 299. ——— *Sowell v. Cox*, 68.
 300. ——— *Gill v. Her Husband*, 28. *Sowell v. Cox*, 68.
 301. ——— *Sowell v. Cox*, 68. *Turner v. Parker*, 154.
 302 to 309. ——— *Sowell v. Cox*, 68.
 374, 377. Reconvention. *Driggs v. Morgan*, 119.
 396. Opposition of third persons. *Gil v. Her Husband*, 28.
 397, 398. ——— *Staples v. Bouligny*, 424.
 401. ——— *Gil v. Her Husband*, 28. *Turner v. Parker*, 154.
 402. ——— *Turner v. Parker*, 154.
 403. ——— *Gil v. Her Husband*, 28. *Sowell v. Cox*, 68.
 ——— *Turner v. Parker*, 154.
 484. Trial. *Thomas v. Kean*, 80.
 487. Bill of exceptions. *Mathias v. Lebre*, 94.
 549. Costs. *Fink v. Martin*, 147.
 579. Appeal. *Turner v. Parker*, 154. *Flower v. Dubois*, 191.
 589. ——— *Harbour v. Brickel*, 419.
 596. ——— *Lynch v. Burr*, 136. *Fink v. Martin*, 147. *Flower v. Dubois*, 191.
 676. Sale under execution. *Bauduc v. Conrey*, 466.
 678. ——— *McRae v. Chapman*, 65.
 681. ——— *Wright v. Higginbotham*, 30.
 683, 684. ——— *McRae v. Chapman*, 65. *Perry v. Holloway*, 107.
 686. ——— *Union Bank of Louisiana v. Smith*, 49.
 689. Judicial Sale. *Felps v. Commissioners of Clinton and Port Hudson Rail Road Company*, 89.
 711. ——— *McRae v. Chapman*, 65.
 715. Discussion. *Sowell v. Cox*, 68.
 619. Judicial Sale. *Turner v. Parker*, 154.
 726, 727. Execution of Judgments. *Lynch v. Burr*, 136.
 732, 733. Executory process. *Courtney v. Andrews*, 180.
 739, 740. ——— *Sowell v. Cox*, 68.
 883. Appeal. *Harbour v. Brickel*, 419.
 972. Successions. *Succession of Duplessis*, 193.
 984. ——— *Brent v. Slack*, 372.
 989. ——— *Succession of Desorme*, 474.
 990, 991, 992. ——— *Succession of Ogden*, 457.
 1007. ——— *Ib.—Re-hearing*, 479.

COMPENSATION.

1. Where one having money on deposit in a bank becomes indebted to it by

the maturity of a note executed by him and held by the bank, compensation will take place, and the debts extinguish each other to the amount of the smaller of the two. *Bank of Louisiana v. Fowler*, 197.

2. Between the parties, compensation, whether by operation of law or by way of exception, produces the same result. When it is ascertained that the parties are mutually indebted to each other at a particular time, from that moment the two debts are extinguished for equal amounts. C. C. 2204. *Ib.*

CONSTITUTION OF THE UNITED STATES.

Art. 1, sect. 8. Power of Congress to lay taxes, imposts, duties, &c. *Master and Wardens of Port of New Orleans v. Prats*. 459.

——— sect. 10. Restriction on power of States to lay imposts, duties, &c. *Ib.*

CONTINUANCE.

1. Where a defendant swears that his principal counsel is unable to attend, as he is informed and believes in consequence of severe illness, and that he cannot safely go to trial without him, he is entitled to a continuance.
Smelser v. Williams, 97.
2. Where a rule of court requires, that the subpoena for a witness shall be given to the sheriff, at the latest, on the day preceding that on which the case is fixed for trial, a party will not be entitled to a continuance on account of the absence of a witness, for whom a subpoena was not delivered to the sheriff in compliance with the rule. *Brown v. Forsyth*, 116.

CONTRACTS.

1. The agreement entered into by the presidents of certain banks in New Orleans, on the 18th of August, 1841, for the purpose of guarantying the circulation of the banks represented by them, by which they bound themselves to contribute, in proportion to the circulation of each bank as authorised by a resolution of the presidents of the 6th April, 1840, for the relief of any one of the number which might be unable to pay or secure the checks drawn on it for the weekly balances, was founded on a good consideration, and is obligatory. The resolution created a several, not a joint obligation, each bank agreeing to contribute in the ratio of its circulation to that of the circulation of all the banks. *Commissioners of the New Orleans Improvement and Banking Company v. Citizens Bank of Louisiana*, 14.
2. A joint obligation is created where several persons join in the same contract, to do the same thing (C. C. 2075), but a several obligation when what is promised by one of its obligors is not promised by the others, but each promises separately for himself to do a distinct thing. Such obligations, though contained in the same act, are as distinct, as if in different acts, made at different times. *Ib.* 2073. *Ib.*
3. A bail bond taken by a magistrate in a case in which he is prohibited by law from admitting the party to bail, is void; and the State cannot recover on it.
State v. Hébert, 41.

4. The prescription of one year, established by art. 1989 of the Civil Code, applies to actions by creditors for the rescision of a contract made in fraud of their rights; not to a suit by creditors holding legal mortgages, to rescind, as to them, a judgment decreeing a general mortgage in favor of the wife on the property of the husband, for the reimbursement of a donation *propter nuptias* made to her by the latter. *Gates v. Legendre*, 74.
5. One who has contracted for a building at a fixed price, will be responsible for the value of extra work, where, from the evidence, it is clear that it must have been done with his consent. *Mathias v. Lebre*t, 94.
6. One discharged as a bankrupt under the act of Congress of 19 August, 1841, who subsequently promises to pay a debt from which he was released by the bankrupt proceedings, will be liable on his promise. *Blanc v. Banks*, 115.
7. A prison-bonds bond will be binding, though it do not conform literally to the words of the statute; it is sufficient that it complies with it in substance. Thus, where a bond, instead of being made payable to the sheriff, is made directly to the party for whose benefit it was intended, such an informality cannot prevent the party interested from recovering on it. *Per Curiam*: Exemption of the debtor from imprisonment is a legal consideration for the bond; and every engagement entered into for a good and lawful consideration is binding, whatever be its form. *Dunbar v. Owens*, 139.
8. Error or want of consideration must be clearly shown to release a party from an obligation, in which he has, under his signature, acknowledged the debt, and admitted a consideration. *Hubbard v. Griffin*, 383.
9. A resolatory condition is implied in all synallagmatic contracts,
Gustine v. Union Bank of Louisiana, 412.
10. To recover the penalty stipulated to be paid, in case of non-compliance by defendant with a contract to deliver certain articles, plaintiff must prove that defendant was put in default previous to the commencement of suit. C. C. 2122. Putting the defendant *in mora*, is an indispensable pre-requisite to such an action. C. C. 1906. The want of it need not be specially pleaded; nor is the effect of the omission to put defendant in default waived by his setting up any special defence. *Hepp v. Commagère*, 524.
11. An actual bankruptcy or *cessio bonorum*, either voluntary or forced, alone has the effect of rendering immediately exigible debts not matured by the lapse of the time stipulated in the contract, or by the happening of the contingency on which the parties agreed that they should become payable. The mere fact of the insolvency of the debtor does not produce such an effect. C. C. 2049. *Funes y Carillo v. Bank of United States*, 533.
12. Where a debt is payable at a particular place, a demand by the creditor there, is a condition precedent, and must be made before instituting suit. *Ib.*

COSTS.

1. An appellee cannot, by entering in the Supreme Court a *remittitur* of a sum incorrectly allowed by the court below as special damages, throw the costs of the appeal on the appellant. *Rhodes v. Skolfield*, 131.
2. A defendant owes no costs until the final termination of the action, and

then only in case judgment be rendered against him. C. P. 549. Otherwise as to plaintiffs. *Fink v. Martin*, 147.

3. A defendant whose property has been sequestered, pending the suit, at the instance of the plaintiff, has a right to have the sequestration set aside, on executing a bond in favor of the plaintiff with the security required by law. C. P. 279. His right to claim possession of the property, is subject to no other condition than that of giving the bond. The sheriff has no right to require from him payment of any of the expenses of the sequestration, before restoring the property. The defendant will be liable therefor, only in case judgment be rendered against him. C. C. 2949. C. P. 283. *Ib.*

COURTS.

1. A Court of Probates has no jurisdiction of any matters in litigation between the surviving spouse and the heirs of the deceased, arising subsequently to the dissolution of the community—particularly of such as may result from the obligations of one of the parties as a *negotiorum gestor*.

Stewart v. Pickard, 18.

2. As a general rule, the jurisdiction of the appellate court attaches as soon as the appeal bond is filed, and the lower court has no longer authority to take any steps but such as may be necessary to transmit the record to the Supreme Court, or, by a provisional and conservatory order, to secure the ultimate execution of the judgment of the appellate court. *Fink v. Martin*, 147.
3. The decision in *Lewis' Heirs v. His Executors et al.* (5 La. 387), that while the judgment or order of a Court of Probates receiving a will and ordering its execution, is unreversed, no other court can declare the will void, or prevent its execution, or examine collaterally into the correctness of the proceedings by which it was admitted to probate, must be understood as relating to cases where the validity of a will is attacked at the time of the order for its execution, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate; and not to actions of revocation in which property is claimed or withheld under a will. Courts of ordinary jurisdiction before whom such actions are brought, must necessarily be competent to decide on the validity of the will thus drawn in question. *Succession of Duplessis*, 193.

CURATOR AD HOC.

Where a curator *ad hoc*, appointed by the court to represent an absent defendant in a revocatory action, omits to except in the lower to the action on the ground of the want of proper parties, the failure to make such parties will be noticed in the appellate court as if it had been specially pleaded below. *Per Curiam*: A curator *ad hoc* cannot be permitted to waive any of the legal rights of the party he represents. *Hyde v. Craldick*, 387.

DISCUSSION.

The plea of discussion cannot be opposed to a creditor holding a special mortgage. C. P. 73. C. C. 3367. Nor can a third possessor of property mort-

gaged for a debt for which other property is also bound, require that it shall be held liable only for a *pro rata* portion of the debt. Each and every part of property mortgaged is liable for each and every portion of the debt.

Bagley v. Tate, 45.

See SURETY, 1. 2. 3. 4.

DONATIONS INTER VIVOS.

1. A partition having been ordered by the Probate Court, of the effects of the community previously existing between the plaintiff and his deceased wife, the former opposed its homologation, claiming to be allowed, as a charge against the community, the price of a slave sold by the father of certain minor heirs of the wife, more than ten years before, under a power of attorney from him, and which price he alleged had never been accounted for. *Per Curiam*: If the value of the slave was intended to be left as a donation in the hands of the person by whom it was sold, the donor cannot revoke it in this way; if as a loan, the action to recover it is prescribed. *Stewart v. Pickard*, 18.
2. Persons who have lived in open concubinage, and have not subsequently married, cannot make to each other any donation *inter vivos* of moveables, exceeding one-tenth of the donor's estate, after deducting the debts and charges against it. *Succession of Bousquet*, 143.
3. A donation *propter nuptias* given to the future wife by another than the husband, forms a part of the dowry, unless there be a stipulation to the contrary. Such a donation by the future husband, does not form any part of it. C. C. 2317, 2318. *Gates v. Legendre*, 74.
4. The wife has no legal or tacit mortgage or privilege on the property of her husband, for the restitution of any donation *propter nuptias*, made to her by the latter. C. C. 2318. *Ib.*
5. The prescription of one year established by art. 1989 of the Civil Code, applies to actions by creditors for the rescision of a contract made in fraud of their rights; not to a suit by creditors holding legal mortgages, to rescind, as to them, a judgment decreeing a general mortgage in favor of the wife on the property of the husband, for the reimbursement of a donation *propter nuptias*, made to her by the latter. *Ib.*

DONATIONS MORTIS CAUSA.

1. Persons who have lived in open concubinage, and have not subsequently married, cannot make to each other any donation *mortis causa* of moveables, exceeding one-tenth of the donor's estate, after deducting the debts and charges against it. *Succession of Bousquet*, 143.
2. Certain slaves were directed to be emancipated by the will of the deceased, and the will was admitted to probate, and an executor qualified, who died without having executed any part of it. No executor was appointed in his place; but the heirs, protesting against the validity of the will, took possession of the property, which they sold, including the slaves ordered to be set free. On an application by a third person to be appointed dative testamentary executor, alleg-

ing that the succession had not been finally administered upon, as the slaves had never been emancipated, which appointment was opposed by the heirs as unnecessary: *Held*, that the facts of the case show no necessity for the appointment of an executor; that the slaves, having been sold and passed into the hands of others, their right to freedom, which has not been impaired by the course pursued by the heirs, must be asserted contradictorily with the persons who purchased them, who are entitled to an opportunity of showing the nullity of the will. *Succession of Dupl  ssis*, 193.

3. The admission of a will to probate, and the order for its execution, are but preliminary proceedings necessary to the administration of the estate; and do not amount to a judgment binding on persons not parties thereto. *Ib.*
4. The decision in *Lewis' Heirs v. His Executors et al.* (5 La. 387), that while the judgment or order of a Court of Probates receiving a will and ordering its execution, is unreversed, no other court can declare the will void, or prevent its execution, or examine collaterally into the correctness of the proceedings by which it was admitted to probate, must be understood as relating to cases where the validity of a will is attacked at the time of the order for its execution, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate; and not to actions of revendication in which property is claimed or withheld under a will: Courts of ordinary jurisdiction before whom such actions are brought, must necessarily be competent to decide on the validity of the will thus drawn in question. *Ib.*
5. The will of one who died without legitimate children or descendants, contained the following provision: *J'institue pour ma l  gataire unique et universelle, ma s  ur E. P., lui donnant et lui l  guant    ce titre la g  n  ralit   des biens que je d  laisserai    mon d  c  s.* *Held*, that this was an absolute institution of an universal heir, by which the legatee became entitled to the whole estate of the testator, and, after the death of the testator, seized of right of the effects of the succession, without being bound to demand the delivery thereof. C. C. 1599, 1602. *Prevost v. Martel*, 512.
6. Art. 1474 of the Civil Code which declares, that where the father disposes in favor of his natural children of the portion permitted by law to be so disposed of by him, he shall dispose of the rest of his property in favor of his legitimate relations, unless he bequeath the rest to some public institution, does not constitute his legitimate relations his forced heirs for the rest of his estate. He is bound to dispose of the rest of his property in favor of his legitimate relations, but he may bequeath it to such of them, one or more, as he may select. *Ib.*
7. Except in the case of accretion from legacies made to several conjointly, as provided for by arts. 1700, 1701 of the Civil Code, the legitimate heirs of a testator will inherit from him only such portion of the succession as may remain undisposed of, either because the testator has not bequeathed it to any legatee or instituted heir, or because the heir or legatee has not been able or willing to accept it. C. C. 1702. Legatees by an universal or particular title, benefit by the failure of the particular legacies which they were bound to dis-

charge (C. C. 1697); and an universal legatee, when he concurs with a forced heir (C. C. 1603), and, *a fortiori*, when he does not, is bound to discharge all the legacies, except in case of reduction. Consequently, where a testator, dying without legitimate descendants, but leaving several brothers and sisters, institutes one of them his universal heir, such universal heir or legatee will be entitled to the benefit resulting from the failure or reduction of the particular legacies, to the exclusion of the other brothers and sisters. *Ib.*

8. Where the instituted heir consents to the execution of the particular legacy, the particular legatee cannot contest the right of the legitimate heirs to attack his legacy as illegal. The unwillingness or refusal of the instituted heir to contest the particular legacy, cannot render it valid; and the particular legatee being incapable of receiving, and the instituted heir unwilling to accept it, the particular legacy remains undisposed of, and must, under article 1702 of the Civil Code, devolve upon the legitimate heirs. *Ib.*
9. A testator, dying without descendants, instituted one of his sisters his universal heir. Another sister and a surviving brother commenced an action against the executor of the deceased, the particular legatees, and the instituted heir, for the purpose of causing the legacies to be declared null. The instituted heir answered, through her attorney in fact, that plaintiffs could not attack the will, as the respondent, being the universal legatee of the testator, was entitled to claim the whole of his estate; averred that the dispositions of the will were legal and valid; and prayed that the petition might be dismissed, and the will maintained in all its parts. *Held*, that the averment of the validity of the will, and the prayer for its execution, do not amount to an acquiescence on the part of the instituted heir, in the illegal dispositions, nor to a consent that the legatees shall take the legacies, notwithstanding their illegality. *Ib.*
10. A testator appointed two persons as his executors, and named two others, A. and B., to replace them, in case of the death or absence of the former, leaving a certain sum to each of those who might discharge the duties of executor. One of the persons first named having died, A. applied to be appointed executor in his place, which was opposed by B., who claimed the appointment. A. obtained a dismissal of his application as in case of non-suit; and a judgment was rendered refusing to appoint B., from which the latter appealed, citing A. as appellee. Pending this appeal, A. renewed his application to the Probate Court, and was appointed executor; and from this judgment no appeal was taken. The first named executor and A. having administered on the estate, afterwards filed a tableau of distribution, by which one of the sums bequeathed to the acting executors was allowed to A., and this tableau was homologated by the Probate Court. A decision being subsequently rendered on the appeal of B., by which the latter was declared to be entitled to the appointment of executor, a rule was taken by him in the Probate Court on A., and on the first named executor, to show cause why the legacy should not be paid to him, B. The rule was made absolute, and the judgment affirmed on appeal.

Succession of Gourjon, 541.

DOTAL PROPERTY.

SEE HUSBAND AND WIFE, 1.

EMANCIPATION OF SLAVES.

Though partial payments have been made to the master by a slave, for the purpose of purchasing his freedom, the latter remains the property of the master, who will continue to be entitled to all his services; and a purchaser, to whom he is afterwards sold, subject to the condition of being emancipated on his paying the supposed balance of his value, will be entitled to all his services until such balance is paid. *Per Curiam*: A slave cannot become partially free; nor can he, until legally and absolutely emancipated, own any property, without the consent of his master. *François v. Lobrano*, 450.

EVIDENCE.

- I. *When to be Introduced.*
- II. *Onus Probandi.*
- III. *Interest of Witness.*
- IV. *Judicial Records.*
- V. *Non-Judicial Records and Copies thereof.*
- VI. *Proof of Contracts not in Writing, over Five Hundred Dollars in Value.*
- VII. *Parol Evidence.*
- VIII. *Admissibility and Sufficiency of Evidence under the Pleadings.*
- IX. *Irrelevant Evidence.*
- X. *Secondary Evidence.*
- XI. *Evidence of Particular Persons.*
 1. *Judges.*
 2. *Parties.*
 3. *Agents.*
 4. *Partners.*
- XII. *Evidence in Particular Actions.*
 1. *Actions on Bills of Exchange and Promissory Notes.*
 2. *Petitory Actions.*
 3. *Actions of Rescission.*

I. *When to be Introduced.*

1. After the argument has commenced no further evidence can be introduced, but by the consent of both parties. C. P. 484. *Thomas v. Kean*, 80.

II. *Onus Probandi.*

2. Defendant sued on a note without date, but bearing interest from a certain

day, pleaded prescription, and the court, assuming that the note was made on the day from which it bore interest, gave judgment in his favor. *Held*, that the court erred in assuming that the note was made on the day from which it bore interest; and that defendant was bound to prove the facts from which relief was sought under the plea of prescription.

3. The defendant purchased from the plaintiff a tract of land and certain shares of bank stock. The land, and a number of slaves on it belonging to the plaintiff were mortgaged to secure the payment of the stock, on which the latter had obtained a loan from the bank. Defendant agreed, as the price of the property, in addition to the payment of a certain sum, to assume the payment of the loan obtained by the plaintiff, and to release the mortgage of the bank on plaintiff's slaves. In an action by plaintiff on notes given for a part of the price, defendant claimed a diminution of the price, on account of a deficiency in the quantity of land sold of more than a twentieth. *Held*, that if the bank stock was of any value to the defendant, its value should be deducted from the whole price before proceeding to fix the ratio of diminution, and that the value to the plaintiff of the release of the mortgage, if capable of being estimated, should be added to the price; that the burden of proving the value of the stock to the defendant, was on the plaintiff; and that the proof of the value to the plaintiff of the release of the mortgage, was on the defendant.

Duplantier v. Newcomb, 103.

4. Though no particular form is required for the dedication of land to public use, the positive assent of the owner, and the fact of its being used for the public purposes intended by the appropriation, must, at least, be shown.

Linton v. Guillotte, 357.

5. The plea of the general issue, in an action against the endorser of a note, throws upon the plaintiff the burden of proving all the facts necessary to a recovery, to wit: demand of the maker, protest, and notice to the endorser.

Ducros v. Jacobs, 453.

6. A plaintiff can neither require the performance, nor recover damages for the non-performance of an agreement, without legal proof of its existence.

Bauduc v. Conrey, 466.

7. A party cannot complain of a sale, made by the sheriff, of real property in block, unless it be alleged and proved that she requested the officer to sell it in separate parts. *Ib.*

8. The general rule is, that he who affirms must prove; but, where a note payable to the payee personally, is on its face not negotiable, and the latter declares, in an agreement with the maker of the same date with the note, that the maker shall be bound to pay the same, only in the event of the payee's complying with two conditions, to wit, not endorsing a certain bond, and performing certain work, and the maker relies on a non-compliance by the payee with the conditions of the agreement, it will, on the principle that a negative cannot be proved, be for the defendant to prove that the payee did endorse the note, and for the plaintiff to establish a compliance with the other condition, to wit, his performance of the work. *Gilmore v. Destréhan*, 521.

9. To recover the penalty stipulated to be paid in case of non-compliance by

defendant with a contract to deliver certain articles, plaintiff must prove that defendant was put in default previous to the commencement of suit. C. C. 2122. Putting the defendant *in mora*, is an indispensable pre-requisite to such an action. C. C. 1906. The want of it need not be specially pleaded ; nor is the effect of the omission to put defendant in default waived by his setting up any special defence. *Hepp v. Commagère*, 524.

III. *Interest of Witness.*

10. In an action by an heir on notes given for the price of real property purchased at the sale of the succession of his ancestor, where security only is asked by the defendants on an allegation of danger of eviction, the vendors of the deceased are competent witnesses to explain facts connected with the title papers, and to prove that they had received the amount of a mortgage appearing to exist in their favor. *Per Curiam*: In a controversy for the land, they could not be heard to support a title derived from themselves, which they would be bound to warrant ; but, in a case like this, they can neither gain nor lose by the result of the suit. Their liability as warrantors, in the event of any dispute in relation to the land, is not lessened nor changed by their testimony, nor would the judgment be admissible in their favor. The objection goes rather to their credibility, than to their competency. *Skolfield v. Rhodes*, 128.
11. The allegation in an answer that a third person is the real plaintiff in the action, is not sufficient to exclude his testimony.

Henderson v. Western Marine and Fire Insurance Company, 164.

12. An insolvent, who had placed on his *bilan* a debt due by him to the plaintiff, will, on the execution of a release to him by the defendant, be a competent witness for the latter, in an action by the plaintiff against him as a dormant partner, to prove that no contract of partnership existed. *Per Curiam*: By the surrender and release the witness became entirely disinterested.

Lacaze v. Séjour, 444.

IV. *Judicial Records.*

13. The return of a sheriff stating the manner in which a citation was served, cannot be contradicted by evidence where that officer has not been called on to correct it. *Bank of Louisiana v. Elam*, 26.
14. Where a *fi. fa.* and the sheriff's return are produced as evidence of a judicial sale, without opposition, it will be sufficient to prove the sale.

Kohn v. Byrne, 113.

15. A party who offers the records of other suits in evidence on the trial in the lower court, is bound to file transcripts of them, at least on being apprized of an appeal, or on being required to do so. Where such transcripts, not having been filed below, could not be included in the record of appeal, the appellant will be entitled to a *certiorari* ; and, in case the appellee should not file them after the writ has issued, the case will be remanded for a new trial.

Hyde v. Craddick, 387.

V. *Non-Judicial Records and Copies thereof.*

16. Where it does not appear from a paper offered in evidence, purporting to be a copy of an authentic act, that the original was signed by two witnesses, it

cannot be admitted in evidence as the copy of an authentic act. An act is not authentic which wants the signature of either of the witnesses required by article 2231 of the Civil Code. *Thomas v. Kean*, 80.

VI. *Proof of Contracts not in Writing, over Five Hundred Dollars in value.*

17. Where the demand exceeds five hundred dollars, the testimony of a single witness, not supported by corroborating circumstances, is insufficient.

Brent v. Slack, 371.

VII. *Parol Evidence.*

18. Defendant having pleaded in reconvention that the plaintiff was indebted to him in a certain sum, as the price of a house and lot, which he had, at her instance, purchased for her, offered the testimony of witnesses to establish those allegations. *Held*, that the evidence being parol, and tending to establish an agency to purchase real estate, was inadmissible. *Breed v. Guay*, 35.
19. Where the defendant in an action to recover a sum of money as a loan, avers that the amount was paid to him as earnest on a contract for the purchase of real estate, parol evidence will be admissible to establish the averment. It cannot be excluded, on the ground that it tends to establish a sale of real property. *Bouche v. Michel*, 92.
20. Parol evidence is inadmissible to support a claim for conventional interest. The proof must be in writing. *Succession of Peytavin*, 118.
21. Where the petition was deposited in the clerk's office, by the plaintiff's attorney, before the time necessary to prescribe the action had elapsed, but in consequence of the absence of the clerk and deputy clerk from the parish, it could not be filed, nor citation be issued until the time had elapsed, the action will not be prescribed. *Contra non valentem agere, non currit prescriptio*. And parol evidence is admissible to prove the fact of the absence of the clerk and his deputy, which rendered it impossible to institute the suit until the time had elapsed. *Smith v. Taylor*, 133.
22. Parol evidence is admissible to show an agency in relation to the sale of slaves, where the object of the evidence is neither to make nor destroy the title thereto, but merely to prove an authority to negotiate as an intermediary between the owner and persons applying to purchase. *Ib.*
23. Parol evidence is inadmissible, on an application for an order of seizure and sale, to strengthen or add to the stipulations in the act of mortgage, or to supply the omission of any stipulation. The evidence must appear on the face of the act itself—not *aliunde*. *Courtney v. Andrews*, 180.
24. Where a contract of sale is attacked on the ground of fraud, parol evidence is admissible to prove the allegations of fraud upon which the contract is sought to be annulled, whenever the consent of the complaining party is shown, under the allegations, to have been the consequence of the fraud. But such evidence is inadmissible to establish a verbal agreement of the defendant to transfer real property, and a fraudulent refusal on his part to comply therewith. C. C. 2255, 2256. *Bauduc v. Conrey*, 466.

VIII. *Admissibility and Sufficiency of Evidence under the Pleadings.*

25. An allegation, in an action to recover a sum of money, that it was loaned to the defendant, is not supported by proof of a deposit. *Bouche v. Michel*, 92.
26. Where in an action by the undertaker on a building contract, there is an allegation in the petition, that "if any alteration was made in the contract, or delay occasioned, it was by the order and consent of the defendant," it is sufficient to authorize the introduction of the testimony of witnesses to prove that the contract was altered with the consent of the defendant. Such evidence would also be admissible to rebut the allegations of the defendant, that the work was not completed within the time specified in, and according to the terms of the contract. *Mathias v. Lebret*, 94.
27. In an action for damages for a malicious arrest, evidence is admissible to prove the condition of the apartment in the jail in which the plaintiff was confined. *Driggs v. Morgan*, 119.
28. Plaintiff having enjoined the execution of a judgment of a justice of the peace, ordering the delivery of the possession of certain premises to defendant, on the allegation that the justice exceeded his jurisdiction, defendant moved to dissolve the injunction, on the ground that it would appear from a complete record filed by him, of the proceedings before the justice, that he did not exceed his jurisdiction. Plaintiff having objected to the admission in evidence of the record filed by defendant: *Held*, that the defendant having asked that the injunction should be dissolved, not on the face of the petition, but on the allegation that the record produced by him would show that the justice had jurisdiction, the record was the basis of the motion to dissolve, and admissible as such. *Bauduc v. Conrey*, 407.

IX. *Irrelevant Evidence.*

29. Plaintiff, who had been divorced for adultery from her former husband, and married her paramour in another State, where such marriages are not, as here, forbidden by law, sued her first husband for the property she had brought into marriage, without being authorized or assisted by her second husband. On an exception to her want of authorization, after her second marriage had been proved, she offered in evidence the record of the suit of her first husband against her, and her conviction of adultery, to prove that she could not legally contract a second marriage. *Held*, that the proof of the second marriage given in support of the exception, is sufficient to show that she is under marital authority, and that she cannot be listened to in alleging her incapacity to contract such a marriage here, resulting from her own violation of law. *Knaps v. Graugnard*, 21.
30. In an action on a policy of insurance against fire, evidence is inadmissible to prove that the loss occurred through the negligence of an agent of the plaintiff. The evidence is irrelevant. *Per Curiam*: The underwriters are answerable for any loss occasioned by the negligence of those in charge of the property insured. Such is the law both of marine and fire insurance. But

the negligence must be unaffected by any fraud or design on the part of the insured. *Henderson v. Western Marine and Fire Insurance Company*, 164.

31. In an action on a policy of insurance, effected on account of the plaintiffs by an agent, testimony to prove that the latter, who had a policy for his own benefit on goods in the same building, designedly set fire to the building, is inadmissible, where it is neither alleged nor proved that they were in any way privy to the act. The act can no more affect the plaintiffs than if done by a stranger. A principal is liable civilly for the frauds or misrepresentations of his agent, made in the course of his employment, though he neither authorized, justified, nor participated in his misconduct, nor even knew of it; but the misconduct, or misrepresentation on the part of the agent, must be while acting as such, within the scope of his agency. Nor will the record of a suit between the agent and the defendants, on his own policy, be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiffs in the action in which it is offered in evidence. The fraud and false swearing on the part of the agent, being in his own case and for his own purposes, was irrelevant; and the principals not being a party to the suit, the matter was *res inter alios acta*, and cannot be used against them. *Ib.*

32. In an action to restrain defendant from selling certain ground, alleged by plaintiff to have been dedicated to public use, a plan of the property published by the former, and a prospectus reciting the conditions on which he proposed to make the dedication, laid before the Council of the city in which the ground is situated, with a view to obtain its co-operation in effecting the dedication, will be admissible in evidence. Any objection to the evidence as irrelevant and not affecting the plaintiff, goes to its effect, not to its admissibility.

Linton v. Guillotte, 357.

X. Secondary Evidence.

33. The certificate of the Governor, under the great seal of the State, is the best evidence of the official character of one styling himself a judge of one of the courts of the State, by whom a commission to take testimony has been executed. Where such evidence is not produced, nor its absence accounted for, parol evidence that the person acted, to the knowledge of the witness, in the capacity assumed by him, cannot be admitted. *Buford v. Johnson*, 456.

XI. Evidence of Particular Persons.

1. Judges.

34. A judge before whom a cause is being tried, is a competent witness for either party. The act of the 25th March, 1828, sec. 6, provides in what manner he shall be sworn, and how his testimony shall be reduced to writing, if required by either party. *Babin v. Nolan*, 373.

2. Parties.

35. Where the affidavit of a party, stating the facts which he intends to establish by a witness, is offered to obtain a continuance on account of the absence of the latter, and his opponent, for the purpose of trying the case, admits that the

witness, if present, would swear to the facts stated in the affidavit, and the case is afterwards continued on other grounds, the affidavit and admission cannot be used at any subsequent term. *Driggs v. Morgan*, 119.

36. Where a party to a suit is sworn as an ordinary witness at the instance of his opponent, he may state all the circumstances connected with the transaction, though not specially interrogated thereto. No interrogatories having been propounded to him as a party, he is bound to tell the whole truth.

Lyons v. Flower, 185.

37. Defendants offered to file a supplemental answer, to which was annexed an affidavit of one of them, detailing the circumstances of a transaction relative to which they desired to interrogate the plaintiff, accompanied with interrogatories requiring him to say whether the facts mentioned in the affidavit were true, and, if not, to state the facts as they occurred. Plaintiff objected to the filing of the answer, on the ground that the interrogatories were not properly propounded: *Held*, that the application to file the answer was correctly rejected, and that the court did not err in requiring the plaintiff to propound separate interrogatories as to the distinct facts, relative to which he intended to question the plaintiff. *Demarest v. Ledoux*, 189.

38. The answers of a party to an action, interrogated under art. 2255 of the Civil Code as to a verbal sale of an immovable, denying the sale, cannot be contradicted. *Bauduc v. Conrey*, 466.

3. Agents.

39. When an agent, by whom insurance has been affected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized and acted when he affected it, and not as proof of perjury.

Henderson v. Western Marine and Fire Insurance Company, 164.

40. An agent may be a witness in all cases, except in suits against the principal on account of the negligence of the agent. In such cases, he cannot be a witness for the principal. *Ib.*
41. An agent is a competent witness for his principal, in an action against the latter to recover a sum of money, alleged to have been paid to the agent through error, and admitted to have been paid by him to his principal. The witness is indifferent, being responsible to one or the other party for the amount in controversy. *McDonogh v. Delassus*, 489.

4. Partners.

42. In an action by the creditor of an insolvent, against a third person as a secret partner of the debtor, the defendant may, on the cross-examination of a witness of the plaintiff's, require him to state any declarations of the insolvent, as to the supposed connection of the latter as a partner with the defendant, made previous to the insolvency. *Per Curiam*: The declarations were part of the *res gestæ*, and made at a time not suspicious. *Lacaze v. Séjour*, 444.

XII. Evidence in Particular Actions.

1. Actions on Bills of Exchange and Promissory Notes.

43. Where the protest of a note and the notary's certificate of notice is offered in

evidence, the opposite party cannot interrogate the notary as to whether the act offered is an original or a copy, and whether the act of record is signed by the witnesses named in the protest. *Per Curiam*: The act of the notary, such as it is presented, must have the effect it is entitled to, without any explanation by witnesses, or being eked out by parol evidence.

Bank of Louisiana v. Black, 59.

44. Where a protest offered in evidence in an action against the endorsers of a note, shows on its face that the note was protested in the presence of two witnesses, but that they did not sign that part of it which certifies the demand and refusal to pay, and the certificate attached, showing in what way the notices were served, appears to have been signed in the original by two witnesses, and the notary certifies a copy from his records, it is sufficient. *Ib.*
45. The written proof of notice of protest, provided by the act of 13th March, 1827, does not exclude parol evidence thereof. *Ducros v. Jacobs*, 453.
46. The notary by whom the protest was made is a competent witness, in an action against the endorser of a note, to prove notice to the latter. *Ib.*

2. *Petitory Actions.*

47. To recover, in a petitory action, against a party in possession claiming title, the plaintiff must not only show a better title than the defendant's, but a title as good as any which the latter can oppose to him, whether vested in the defendant or not. But the outstanding title in such third person must be legal, subsisting, and better title than the plaintiff's; and, in fairness, should be set forth in the answer, that the plaintiff may have notice thereof.

Williams v. Riddle, 505.

3. *Actions of Rescission.*

48. Proof of an offer by the vendor of a slave, made while the parties were in treaty to compromise the difficulties between them, to give the vendee another in place of the one sold to him, will exonerate the purchaser from the necessity of proving, in a redhibitory action, a tender of the slave.

Smith v. Taylor, 133.

EXCEPTIONS, BILL OF.

1. Where a bill of exceptions is insufficient to enable the court to test the correctness of the decision of the inferior tribunal, its judgment will be presumed to be correct. *Thomas v. Kean*, 80.
2. Where a party desires to oppose the admission of the report of experts, he must object to it when offered, and except to the opinion of the court admitting it. Where this has not been done, no objection to its admission can be urged on a motion for a new trial. *Mathias v. Lebre*, 94.

EXECUTION OF JUDGMENT.

1. Neither a married woman, though entitled, in virtue of her general mortgage on the property of her husband, to be paid out of the proceeds in preference to any subsequent creditor, nor any mortgage or other creditor can arrest the sale of property seized under execution, on the mere ground of

having a preference upon its proceeds. Under articles 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, and may claim to have the effect of the seizure regulated as it relates to him, when he asserts a preference on the proceeds of the things seized and sold; and the court may order the amount to be retained by the sheriff, subject to its order. In such a case the sheriff may be enjoined from paying the proceeds to the seizing creditor.

Gil v. Her Husband, 28.

2. Irregularities arising subsequent to a judicial sale, such as an irregularity in taking the bond of a purchaser, etc., cannot affect the rights acquired under the sale. But where the subsequent irregularity is rather a continuation of one existing previous to the adjudication, or has been caused by an irregularity in the proceedings previous to the sale, as where the advertisement of a sale at twelve months' credit does not state that the bond is to bear interest from the day of the adjudication at the rate allowed by the judgment, as required by art. 681 of the Code of Practice, and the bond consequently is not taken so as to bear the interest allowed by the judgment on which the execution was issued, the rule that, under a forced alienation of property the purchaser will require no title unless the formalities of the law be strictly complied with, applies, and the sale will be invalid. *Wright v. Higginbotham*, 30.
3. Plaintiff's intestate, as assignee of a judgment against four parties, agreed to accept from two of the debtors a title to a tract of land in satisfaction thereof, and gave a receipt on the *fi. fa.* issued on the judgment for its amount in full. The act of sale was prepared and signed by one of the two debtors, but the other died before executing it, and before he had been put in default, and his executor offered to complete the act. In an action to cancel the receipt: *Held*, that by signing the receipt on the *fi. fa.* plaintiff's intestate abandoned his rights thereunder, reserving only what he acquired against the two debtors who contracted to give the title to the land; that one having complied with his obligation, and the other dying without having been put in *mora*, the contract with them cannot be abandoned, and the obligation of the others revived. Judgment in favor of defendants as in case of non suit.

Chapman v. Hardesty, 34.

4. A sheriff, by whom real property is about to be sold, is required by law to read a certificate from the recorder of mortgages, showing all the mortgages existing on it; and he should announce that the purchaser is entitled to retain in his hands out of the price of the adjudication, the amount required to satisfy the privileged debts and special mortgages to which it is subject, taking the bond of the latter, when the sale is on credit, only for the surplus. If the bid be insufficient to discharge anterior special mortgages, no adjudication can take place. *McRae v. Chapman*, 65.
5. Where the certificate read by the sheriff at the sale of property at twelve months' credit, omits to mention a mortgage in favor of certain prior vendors of the property, and the purchaser is afterwards evicted by them, the bonds of the purchaser will be annulled, as given in error and without consideration. The omission, of itself, is enough to invalidate the adjudication. C. P. 673, 683, 684. C. C. 1813, 1818. *Id.*

6. According to arts. 683, 684 of the Code of Practice, privileges and special mortgages existing on property offered for sale by sheriffs, in favor of others than the seizing creditor and which are preferred to him, form a part of the price for which it may be sold; and it cannot be sold unless something be offered above their amount. The sheriff is required to announce that the purchaser may retain out of the price offered the amount of such privileged debts and special mortgages. The purchaser is bound to pay the previous incumbrances as a part of the price. If it turn out that a special mortgage or privilege, certified to exist upon the property, had been extinguished, or never attached, as where, in the case of a mortgage to secure against future endorsements, the endorser has never been made liable, the owner himself, or his creditors, in case of a surrender, may recover of the purchaser the amount thus erroneously estimated as a part of the price. *Perry v. Holloway* 107.
7. Where property is offered for sale by a sheriff, and he does not comply with the law requiring him to announce the privileges and special mortgages existing on it, so as to make it certain what price the purchaser understood he was to pay, the sale will be null. *Ib.*
8. Property claimed by a plaintiff cannot be alienated pending the action, so as to prejudice his rights. If judgment be rendered in his favor, the sale will be considered as the sale of another's property, and will not prevent his being put in possession by virtue of the judgment. C. C. 2428. *Kohn v. Byrne*, 113.
9. Where judgment has been rendered in favor of a party, but with a stay of execution until he shall furnish bond in a fixed sum, with sufficient securities, for the indemnification of the defendant, the latter is not entitled to any notice of the filing of the bond, to give him an opportunity of objecting to its sufficiency, before execution be taken out. The plaintiff is bound, at his peril, to give a sufficient bond. If he fail to do so, his execution may be enjoined; but the party enjoining must take the consequences, if the bond should, upon enquiry, prove sufficient. *Rhodes v. Skolfield*, 131.
10. The only property of a debtor having been sold under a *fi. fa.*, the purchaser, after assuming the payment of certain claims, gave a twelve months' bond for the balance coming to the debtor. The conditions of the sale not having been complied with, the property was resold. The purchaser at the first sale having subsequently obtained a judgment against the debtor, seized in the hands of the sheriff the bond given by him to the debtor, claiming its amount out of the proceeds of the second sale. The bond was not sold but handed over to him. On a rule taken by the wife of the debtor, under art. 301 of the Code of Practice, to show cause why the proceeds of the sale should not be brought into court, and distributed among the creditors of the defendant in execution, according to their privileges and mortgages: *Held*, that the purchaser at the first sale acquired no title to the bond by its delivery to him; that it remained the property of the defendant in execution, representing the portion of the price supposed to be coming to him; and that neither he, nor the party who pretends to have acquired his rights, can claim its proceeds in opposition to the mortgage creditors of the latter, the defendant in the execution. *Turner v. Parker*, 154.

EXECUTOR.

See SUCCESSIONS, III.

EXECUTORY PROCESS.

1. A creditor whose debt is payable in instalments, and secured by mortgage, on the failure of the debtor to pay any instalment, may require the property to be sold for the payment of the whole debt, provided the sale be for cash for so much only as is due, and for the balance on the terms of credit stipulated in the original contract. C. P. 686. *Union Bank of Louisiana v. Smith*, 49.
2. The effect of the clause *de non alienando* in a mortgage, is to render void, as regards the mortgagee, any alienation or transfer of the property made in violation of the mortgage; and the mortgagee may have the property seized and sold as if no change of owners had taken place, and without making the vendee of the mortgagor a party to the executory proceedings. *Haley v. Dubois*, 54.
3. Defendants having sold certain lots of ground to the plaintiff and another person, the purchasers gave their notes for the price, payable at future periods. The notes were identified with the act of sale, and secured by mortgage on the property. The other purchaser having subsequently sold his interest to the plaintiff by an act of sale in which the defendants intervened for the purpose of correcting an error in the description of the property, the notes first given were cancelled, and others were executed by the last purchaser, payable to the defendants, or bearer, for the same amounts and maturing at the same periods as the first. These notes were certified by the parish judge to have been given to secure the purchase money of the property; but no mortgage was reserved to secure their payment. Two of the notes last given having been protested for non payment at maturity, the defendants took out an order of seizure and sale under the act in which a mortgage was reserved in their favor, annexing to their petition therefor the protested notes. On a motion to dissolve: *Held*, that to entitle a party to executory process, as the owner of an act importing a confession of judgment, containing a privilege or mortgage in his favor, it must appear from the act itself, that the debtor has declared or acknowledged therein the debt for which the privilege or mortgage was given; that the order of seizure and sale having been applied for under an act containing no declaration, on the part of the plaintiff, of his being indebted to the defendants in the amount sued for, and the notes annexed to the petition not being mentioned in the act, no executory process could be legally issued thereon; that no such process could be issued under the first sale, as the notes given under it are admitted to have been cancelled; nor under the second, the defendants not being recognized, nor alluded to therein as the creditors of the plaintiff. *Courtney v. Andrews*, 180.
4. Parol evidence is inadmissible, on an application for an order of seizure and sale, to strengthen or add to the stipulations in an act of mortgage, or to supply the omission of any stipulation. The evidence must appear on the face of the act itself—not *aliunde*. *Ib.*

EXPERTS.

Where a party desires to oppose the admission of the report of experts, he must

object to it when offered, and except to the opinion of the court admitting it. Where this has not been done, no objection to its admission can be urged on a motion for a new trial. *Mathias v. Lebrez*, 94.

FERI FACIAS.

See EXECUTION OF JUDGMENT.

FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

Plaintiff having recovered a judgment against the Firemen's Insurance Company of New Orleans, propounded interrogatories to a stockholder, cited as a garnishee, who answered that he had owned certain shares in the company, but had forfeited them under the third section of the charter, before being made garnishee, by failing to pay the balance due on the shares subscribed for by him. He admitted that he had not sold or otherwise disposed of the shares, and had paid but a certain portion of the price of each: *Held*, that the liability of the garnishee resulted from his answer; that the forfeiture of the shares of delinquent stockholders, provided for by the third section of the charter, was a means given to the company to enforce, for its own protection, the payment of the amount subscribed for; that, without the action of the company, the stockholders do not lose their property in their respective shares; that the creditors of the company are entitled to the whole stock for the security of any judgment obtained against the company; and that the company could not by any act of their, to the prejudice of their creditors, liberate any of its stockholders from their obligations to pay the full price of the shares subscribed for by them.

Brode v. Firemen's Insurance Company of New Orleans, 440.

FRAUD.

Questions of fraud and simulation are peculiarly within the province of a jury. *Grant v. Hurst*, 422.

See HUSBAND AND WIFE, 5. 10. SALE, 19. 20. 21. 22. 23.

HUSBAND AND WIFE.

- I. *Dotal and Paraphernal Property.*
- II. *Donations Propter Nuptias.*
- III. *Community of Gains.*
- IV. *Separation of Property.*
- V. *Contracts of Married Woman.*
- VI. *Actions by Married Woman.*

I. *Dotal and Paraphernal Property.*

1. The right of a husband on the property of his wife under his administration, is similar to that of the usufructuary; and where the property owned by the wife

at the time of the marriage, consisted of cattle, the rules laid down by art. 586, 587 of the Civil Code, as to the responsibility of the usufructuary, apply to the husband. Thus, where the community is dissolved by the death of the husband, and the cattle brought by the wife into the marriage, are shown to have increased, she will be entitled to claim as her separate property a number equal to that brought by her into marriage. Nor is it necessary that she should identify any of the cattle as those which belonged to her at the time of the marriage. If the whole herd do not die, the husband is bound to make good the number of the dead out of the new born cattle. *Wimbish v. Gray*, 46.

2. The wife's mortgage for the reimbursement of her paraphernal property attaches only from the date of the actual receipt of the price by her husband.

Turner v. Parker, 154.

II. *Donations Propter Nuptias.*

3. A donation *propter nuptias* given to the future wife by another than the husband forms a part of the dowry, unless there be a stipulation to the contrary. Such a donation by the future husband, does not form any part of it. C. C. 2317, 2318. *Gates v. Legendre*, 74.
4. The wife has no legal nor tacit mortgage or privilege on the property of her husband, for the restitution of any donation *propter nuptias*, made to her by the latter. C. C. 2318. *Ib.*
5. The prescription of one year established by art. 1989 of the Civil Code, applies to actions by creditors for the rescission of a contract made in fraud of their rights; not to a suit by creditors holding legal mortgages, to rescind, as to them, a judgment decreeing a general mortgage in favor of the wife on the property of the husband, for the reimbursement of a donation *propter nuptias* made to her by the latter. *Ib.*

III. *Community of Gains.*

6. The price of a slave who belonged to the husband before the marriage, but was sold by him during its existence, cannot be charged to the community, without proof that the price was employed for its benefit.
Stewart v. Pickard, 18.
7. A partition having been ordered by the Probate Court of the effects of the community previously existing between the plaintiff and his deceased wife, the former opposed its homologation, claiming to be allowed, as a charge against the community, the price of a slave sold by the father of certain minor heirs of the wife, more than ten years before, under a power of attorney from him, and which price he alleged had never been accounted for. *Per Curiam*: If the value of the slave was intended to be left as a donation in the hands of the person by whom it was sold, the donor cannot revoke it in this way; if as a loan, the action to recover it is prescribed. *Ib.*
8. The community of *acquêts* ceases to exist by the death of either spouse. A title to an undivided half of the property vests in the survivor and the heirs of the deceased; and if the former continue in the enjoyment of the common property, he will be bound by the obligations of a *negotiorum gestor*. *Ib.*

9. Art. 2377 of the Civil Code, which provides that when the hereditary property of either of the spouses has been increased or improved during the marriage, the other shall be entitled to one half of the value of such increase or amelioration if proved to have been the result of the common labor or expense, does not contemplate that to ascertain the value of such increase or improvement, every item of improvement shall be estimated separately, and the aggregate amount added to the estimation of the land. This would often be unjust, as the increased value of the property would, in many cases, be far from equal to the original cost of such improvements. *Babin v. Nolan*, 373.

IV. Separation of Property.

10. The creditors of the husband may contest the validity of a separation of property, though decreed and even executed, when made with a view to defraud them, and they are injured thereby. C. C. 2408. *Gates v. Legendre*, 74.

V. Contracts of Married Woman.

11. Wherever it is shown that the consideration of the obligation of a married woman, contracted jointly with her husband, enured to her use and benefit, and was not a thing which her husband was bound to furnish her with, she will be bound thereby. She cannot, in such a case, be considered as having bound himself as security for her husband, or conjointly with him for a debt in which, he alone is interested. As where a sum of money, for the repayment of which a note was executed jointly by the husband and wife, was applied to the extinguishment of a debt due by the husband to a minor, which was secured by a general legal mortgage existing on certain property of the husband's at the time of its purchase by the wife. *Per Curiam*: The consideration of the obligation may be viewed as a part of the price of the property purchased by her. *Sowell v. Cox*, 68.

12. A wife holding the first mortgage on the property of her husband, cannot, by renouncing in favor of others, injure a subsequent mortgagee, by placing before him a larger amount of mortgages than originally existed. Subsequent mortgagees in whose favor she may renounce, transferring to them all her rights, will take her place to the extent of her mortgage, and she will retain her priority over other and inferior mortgagees only for the surplus of her claim, after deducting the claims of those in whose favor she renounced.

Turner v. Parker, 154.

VI. Actions by Married Woman.

13. Plaintiff, who had been divorced for adultery from her former husband, and married her paramour in another State, where such marriages are not, as here, forbidden by law, sued her first husband for the property she had brought into marriage, without being authorized or assisted by her second husband. On an exception to her want of authorization, after her second marriage had been proved, she offered in evidence the record of the suit of her first husband against her, and her conviction of adultery, to prove that she could not legally contract a second marriage. *Held*, that the proof of the second marriage

given in support of the exception, is sufficient to show that she is under marital authority, and that she cannot be listened to in alleging her incapacity to contract such a marriage here, resulting from her own violation of law.

Knaps v. Graugnard, 21.

14. The 6th sec. of art. 298 of the Code of Practice was intended to enable the wife to prevent the husband, pending a suit for a separation of property, from disposing, to her prejudice, of the property held in community, or on which she has a privilege for her dotal rights. In such a case she may obtain an injunction against her husband; but, with regard to his creditors, her remedy, when she seeks only to exercise a right of preference, is pointed out by art. 300 of the same Code, and those under which her third opposition should be conducted. *Gil v. Her Husband*, 28.

INJUNCTION.

1. Section 3 of the act of 25 March, 1831, and section 3 of the act of 29 March, 1833, do not authorize the court, on the dissolution of an injunction, to increase the interest, where the original judgment bears interest at ten per cent a year. This principle applies with greater force, where the party enjoining is not the debtor. Whatever else it may be proper to allow, must be in the form of damages. *Whittemore v. Watts*, 39.
2. The plaintiff in a suit commenced by injunction to stay an order of seizure and sale, cannot plead in a supplemental petition, filed after the issuing of the injunction, as an offset to the defendant's claim, matters which arose subsequently to the issuing of the injunction, and presented entirely new grounds.
Bagley v. Tate, 45.
3. Where the plaintiff, in a petition to enjoin an order of seizure and sale obtained on a mortgage to secure a note, alleges the illegality of the note as the ground of enjoining the sale, the injunction cannot be dissolved on the face of the pleadings. An injunction may be had, whenever it is necessary to preserve the property in dispute pending the suit. *Sowell v. Cox*, 68.
4. No allowance can be made on dissolving an injunction, for the fees of counsel employed in defending the suit, where there is no proof that any sum had been actually paid by the defendant. *Rhodes v. Skolfield*, 131.
5. Where on the dissolution of an injunction obtained by a party to arrest the execution of a judgment ordering him to deliver possession of certain premises, damages cannot be allowed under the third section of the act of 25 March, 1831, in consequence of their being no judgment on which they can be calculated, the right of the defendant in the injunction to sue for the damages on the injunction bond will be reserved. *Bauduc v. Conrey*, 407.

See HUSBAND AND WIFE, 14.

INSOLVENCY.

1. The cashier of the branch of a bank may, as an act of administration, accept the surrender of a debtor of the bank, and vote for a syndic; but without an express and special authority from the directors, he cannot discharge the in-

solvent. The granting of such a discharge is an act of ownership, and not of administration. C. C. 2965, 2966.

Union Bank of Louisiana v. Bagley, 43.

2. The discharge of an insolvent who has made a *cessio bonorum*, granted by the creditors, is not an absolute remission of the debt. It rather releases the person of the debtor, than extinguishes the debt itself, which will continue to exist for any balance not paid out of the assets surrendered. *Ib.*
3. The syndic of the creditors of an insolvent is responsible for the whole proceeds of the sale of the estate, as shown by the *procès-verbal* of the sale. Where credit is claimed for any sum, he must show that he used proper diligence to secure and collect the amount. *Succession of Desorme*, 474.
4. Where the syndic of the creditors of an insolvent pays money without authority from the court, he cannot require that the persons so paid shall be made parties to any proceedings against him, to render him responsible for the sums thus paid. *Ib.*
5. An actual bankruptcy or *cessio bonorum*, either voluntary or forced, alone has the effect of rendering immediately exigible debts not matured by the lapse of the time stipulated in the contract, or by the happening of the contingency on which the parties agreed that they should become payable. The mere fact of the insolvency of the debtor does not produce such an effect. C. C. 2049.

Funes y Carillo v. Bank of the United States, 533.

INSURANCE.

1. In an action on a policy of insurance against fire, evidence is inadmissible to prove that the loss occurred through the negligence of an agent of the plaintiff. The evidence is irrelevant. *Per Curiam*: The underwriters are answerable for any loss occasioned by the negligence of those in charge of the property insured. Such is the law both of marine and fire insurance. But the negligence must be unaffected by any fraud or design on the part of the insured.
Henderson v. Western Marine and Fire Insurance Company, 164.
2. In an action on a policy of insurance, effected on account of the plaintiffs by an agent, testimony to prove that the latter, who had a policy for his own benefit on goods in the same building, designedly set fire to the building, is inadmissible, where it is neither alleged nor proved that they were in any way privy to the act. The act can no more affect the plaintiffs than if done by a stranger. A principal is liable civilly for the frauds or misrepresentations of his agent, made in the course of his employment, though he neither authorized, justified, nor participated in his misconduct, nor even knew of it; but the misconduct, or misrepresentation on the part of the agent, must be while acting as such, within the scope of his agency. Nor will the record of a suit between the agent and the defendants, on his own policy, be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiffs in the action in which it is offered in evidence. The fraud and false swearing on the part of the agent, being in his own case and for his own purposes, was irrelevant; and the principals not being a party to the suit, the matter was *res inter alios acta*, and cannot be used against them. *Ib.*

3. Where an agent, by whom insurance had been effected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized and acted when he effected it, and not as proof of perjury. *Ib.*
4. Where defendants, sued on a policy of fire insurance underwritten by them, are shown to have consented that the property damaged by the fire should be sold at auction, the price at which it was sold is a proper criterion by which to estimate the damage of the insured. *Ib.*
5. Where a policy of insurance recites that the "insurers shall not be liable for mutiny," the mutiny is but an excepted risk. So, where the language of the policy is "*warranted* free from insurrection," it does not create a technical warranty, but only exempts the insurers from liability on account of losses which may be sustained in consequence of an insurrection or mutiny. In common parlance, there is little or no difference between mutiny and insurrection; and the word *warranted* is often used where there is no warranty in fact.

McCargo v. New Orleans Insurance Company, 202.

6. The *last* cause of a loss is not necessarily the *proximate* cause. *Ib.*
7. All the consequences naturally flowing from a peril insured against, or incident thereto, are properly attributable to the peril itself. *Ib.*
8. Where the insurers of a cargo of slaves are exempted, by the policy, from the risk of insurrection, and the slaves take possession of the vessel by force, turn her from her course, and enter a foreign port, where they escape, the insurrection must be considered as the cause of the breaking up of the voyage and the insurers will not be liable. *Ib.*
9. In principle there is no difference between a successful insurrection of slaves, who form themselves the subject of the insurance, and a capture by an enemy, which, *prima facie*, amounts to a total loss. *Ib.*
10. Where insurance has been effected on slaves shipped from one port to another, the insurers will not be liable where the usual and necessary precautions in providing irons, and in maintaining security, or in the relative numbers of the whites and slaves have not been observed. In such case, the party is left to his recourse against the owners of the vessel.

McCargo v. Merchants' Insurance Company of New Orleans, 334.

11. The seaworthiness of a vessel on whose cargo insurance has been effected, is a condition precedent; and, if not seaworthy at the time of sailing, the policy will not be considered as having ever attached. *Ib.*
12. An insurance of slaves protects the insured against any loss arising from their mutiny and insurrection, unless the peril be expressly excepted or warranted against. The articles of the Civil Code rendering the owners of slaves liable for their offences and quasi-offences (C. C. 2300, &c.), do not apply to such a case, which is governed wholly by the commercial law. *Ib.*
13. Where insurance was made on the cargo of a vessel from one port to another, the policy will attach though the cargo was put on board at another place than that named as the port from which the vessel was to sail, where it is the usage for vessels sailing from the port named, to take in their cargoes at the place at which it was actually received on board. *Ib.*

14. Where a vessel on whose cargo insurance has been effected, stops, in descending a river, at different places, for the purpose of taking in further cargo or passengers, such stoppages will not amount to a deviation, when proved to have been conformable to the usages of the trade, and of no unusual length.

Lockett v. Merchants' Insurance Company of New Orleans, 339.

INTEREST.

1. Section 3 of the act of 25 March, 1831, and section 3 of the act of 29 March, 1833, do not authorize the court, on the dissolution of an injunction, to increase the interest, where the original judgment bears interest at ten per cent a year. This principle applies with greater force, where the party enjoining is not the debtor. Whatever else it may be proper to allow, must be in the form of damages. *Whittemore v. Watts*, 39.
2. Payments made by one who owes a debt bearing interest, cannot, without the consent of the creditor, be imputed to the reduction of the capital, while any interest is due. C. C. 2160. *Union Bank of Louisiana v. Kindrick*, 51.
3. Parol evidence is inadmissible to support a claim for conventional interest. The proof must be in writing. *Succession of Peytavin*, 118.
4. The legal interest on a sum discounted by a bank, is that established by its charter. C. C. 2895. *Commissioners of the Clinton and Port Hudson Railroad Company v. Kernan*, 174.
5. The provision of the 19th section of the act of 1834, relative to the Clinton and Port Hudson Railroad Company, which declares, that the mortgages for stock and loans granted by virtue of that act, shall bear interest at the rate of ten per cent a year, after maturity, until paid, applies only to subscriptions for the part of the stock to be secured by mortgage. Under the charter, eight per cent is the rate of legal interest, arising *ex mora*, on a note given for money loaned. Sect. 8. *Ib.*
6. Under the 17th section of the act of 7th April, 1824, incorporating the Bank of Louisiana, which declares that if the bank "shall, at any time, suspend or refuse payment, in current money of the United States, of any of its notes, bills or obligations, or of any moneys received upon deposit, the holder of any such note, bill or obligation, or the person entitled to demand and receive such moneys, shall be entitled to interest thereon from the time of such suspension or refusal until the same shall be fully paid, at the rate of twelve per cent per annum," the holder of a claim can recover interest at that rate only from the time of a demand, or from the period when the bank was in default, and not from the date of a general suspension of specie payments, without such demand. This section does not apply to claims by a stockholder for dividends due by the bank. It was intended to provide for the public dealing with the bank, and not for the stockholders *inter se*. The legislature never intended to subject the stockholders to such a penalty towards each other, for not paying their dividends in specie. *Bank of Louisiana v. Fowler*, 196.
7. Interest will be allowed on debts due by estates administered by curators, executors, or administrators, if the estate be sufficient, from the death of the debtor, if then due, or, from the time of becoming due, if after that event,

though no judicial demand have been made (C. P. 989) ; but this interest cannot exceed five per cent on debts on which a higher rate has not been stipulated in writing by the terms of the contract. *Succession of Desorme*, 474.

8. Compound interest cannot be recovered, *Ib.*
9. Under the 6th section of the act of 13th March, 1837, requiring executors, administrators, curators, and syndics to render full and fair accounts of their administration, at least once in every twelve months, under pain of dismissal from office, and of being condemned to pay interest at the rate of ten per cent a year on all sums for which they may be responsible, from the expiration of the twelve months, the payment of such interest is a part of the penalty, and necessarily coupled with the removal from office, and one cannot be imposed without the other ; and such penalties can be inflicted only in cases which have arisen since the promulgation of the act. *Ib.—Rehearing*, 479.
10. The syndic of a succession found, after an examination of his accounts, to owe a balance to the estate, should be condemned, like a curator or executor, to pay interest thereon, at the rate of five per cent a year, from the date of the judgment. C. P. 1007. *Ib.*

INTERNATIONAL LAW.

1. A vessel on the high seas, in time of peace, engaged in a lawful voyage, is under the exclusive jurisdiction of the State to which her flag belongs ; as much so, as if constituting a part of its own domain. If forced by any unavoidable cause into a port of a friendly power, she loses none of the rights appertaining to her on the high seas, but herself and cargo, and the persons on board, with their property, and all the rights incident to their personal relations as established by the laws of the State to which they belong, are placed under the protection which the law of nations extends to the unfortunate under such circumstances. Although the jurisdiction of the nation over the vessel belonging to it is not wholly exclusive ; and though, for any unlawful acts committed while in such a situation, by the master, crew, or owners, she and they may be responsible to the laws of the place, yet the local law does not supersede the law of the country to which the vessel belongs, so far as relates to the rights, duties and obligations of those on board. *McCargo v. New Orleans Insurance Company*, 202.
2. Where slaves shipped from one port of the United States to another, rise upon the officers of a vessel, and take her into a British port, they will be considered still as slaves, though in a state of insurrection. *Per Curiam*: They did not cease to be the property of their owners, though in a state of insurrection, and though the right of property could not be ascertained in a British court, nor enjoyed within the exclusive influence of British laws. *Ib.*

INTERPRETATION.

1. Where a clause in a contract of sale, if interpreted literally, would be contradictory of other parts of the act, and of doubtful meaning, the common intention of the parties, rather than a literal construction of the clause, should determine the interpretation. C. C. 1945. *Ross v. Garlick*, 365.

2. Where the language of an agreement is susceptible of two meanings, it must be interpreted in the sense most congruous to the whole contract. C. C. 1947.

Ib.

JUDGMENT.

1. The creditors of the husband may contest the validity of a separation of property, though decreed and even executed, when made with a view to defraud them, and they are injured thereby. C. C. 2408. *Gates v. Legendre*, 74.
2. The prescription of one year established by art. 1989 of the Civil Code, applies to actions by creditors for the rescission of a contract made in fraud of their rights; not a suit by creditors holding legal mortgages, to rescind, as to them, a judgment decreeing a general mortgage in favor of the wife on the property of the husband, for the reimbursement of a donation *propter nuptias* made to her by the latter. *Ib.*
3. The notification of the filing of the account and tableau of distribution of an executor, operates as a citation to all persons concerned, creditors as well as legatees; and the homologation of the account and tableau, bars all further enquiry as to all matters included therein. *Succession of Peytavin*, 118.
4. The admission of a will to probate, and the order for its execution, are but preliminary proceedings necessary to the administration of the estate; and do not amount to a judgment binding on persons not parties thereto.
Succession of Duplessis, 193.
5. The decision in *Lewis' Heirs v. His Executors et al.* (5 La. 387), that while the judgment or order of a Court of Probates receiving a will, and ordering its execution, is unreversed, no other court can declare the will void, or prevent its execution, or examine collaterally into the correctness of the proceedings by which it was admitted to probate, must be understood as relating to cases where the validity of a will is attacked at the time of the order for its execution, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate; and not to actions of revendication in which property is claimed or withheld under a will. Courts of ordinary jurisdiction before whom such actions are brought, must necessarily be competent to decide on the validity of the will thus drawn in question. *Ib.*
6. Plaintiff intervened in a suit in which defendants had attached certain property as belonging to their debtors, claiming it as his, together with "any loss he might sustain by reason of said seizure." There was no other allegation of injury or damage caused by the seizure, nor was evidence offered to prove any. The property was adjudged to the intervenor, but no damages were allowed, nor was any claim for them urged, nor was the cause asked to be remanded to assess them. In a subsequent action by the intervenor for damages sustained by the attachment, and exception *rei judicata*: *Held*, that the exception should be overruled; the actions not being the same, nor founded on the same cause of action. C. C. 2245. *Preston v. Slocomb*, 361.
7. In an action by a judgment creditor to rescind a sale of property made by his debtor as fraudulent or simulated, the vendee, when not a party to the judg-

ment, may contest the plaintiff's demand in the same manner as the debtor might have done before judgment. C. C. 1971. *Ib.*

8. A judgment obtained against a surety does not change the character of his debt, nor his relation to the principal debtor; and a prolongation of time granted to the latter will release the former, in the same manner as if no judgment had been obtained. The judgment creditor can do no act, whereby the rights or recourse of the surety against the debtor may be destroyed or impaired. If he make a novation, or grant time to the principal debtor, the surety is as effectually discharged, as if the judgment had been satisfied. C. C. 2194, 3022.

Gustine v. Union Bank of Louisiana, 412.

9. A judgment neither creates, adds to, nor detracts from the debt of the party against whom it is rendered. It only declares its existence, fixes its amount, and secures to the creditor the means of enforcing its payment. If the debt create a privilege or tacit mortgage, they exist independently of the judgment. *Ib.*

JURY.

Questions of fraud and simulation are peculiarly within the province of a jury.

Grant v. Hurst, 422.

LETTING AND HIRING.

1. An undertaker who has recovered a judgment for work and labor on a building, but whose contract was never recorded, and who neither prayed for, nor was allowed any privilege by the judgment, acquires no lien on the property or its proceeds. *Turner v. Parker*, 154.
2. Where the master receipts for articles to be shipped on his vessel, as in good order, the vessel will be responsible for any damage subsequently discovered, unless clearly proved to have occurred before the delivery. And where he gives a receipt for goods left on the levée, they are as much at the risk of the ship, as if actually on board. *Barrett v. Salter*, 434.
3. Where the goods left on the levée to be shipped, are exposed to rain, and the shipper subsequently proposes to the master to ascertain the damage from the exposure, before the voyage, and the latter declines to do so, the vessel will be responsible for any increase of damage resulting from the voyage, and the delay to which the goods are necessarily exposed in the foreign port before they could be examined. *Ib.*

LOAN.

A partition having been ordered by the Probate Court, of the effects of the community previously existing between the plaintiff and his deceased wife, the former opposed its homologation, claiming to be allowed, as a charge against the community, the price of a slave sold by the father of certain minor heirs of the wife, more than ten years before, under a power of attorney from him, and which price he alleged had never been accounted for. *Per Curiam*: If the value of the slave was intended to be left as a donation in the hands of the person by whom it was sold, the donor cannot revoke it in this way; if as a loan, the action to recover it is prescribed. *Stewart v. Pickard*, 18.

MINOR.

1. The first section of the act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy, having declared that the benefit of the act shall not be extended to any one owing debts in consequence of a defalcation as a guardian, a tutor, against whom a judgment has been rendered for an amount due to the minors under his care, and who subsequently applied to be declared a bankrupt and was discharged as such, not being protected by the proceedings in bankruptcy, may afterwards appeal from the judgment rendered against him. His assignee should not be made a party to the appeal.

Collins v. Marshall, 112.

2. The action by one who has attained majority, against his tutor, for an account of his tutorship, is prescribed by four years, commencing from the day of majority. C. C. 356. *Gourdain v. Davenport*, 173.

MORTGAGE.

1. Neither a married woman, though entitled in virtue of her general mortgage on the property of her husband to be paid out of the proceeds in preference to any subsequent creditor, nor any mortgage or other creditor, can arrest the sale of property seized under execution, on the mere ground of having a preference upon its proceeds. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, and may claim to have the effect of the seizure regulated as it relates to him, when he asserts a preference on the proceeds of the things seized and sold; and the court may order the amount to be retained by the sheriff, subject to its order. In such a case the sheriff may be enjoined from paying the proceeds to the seizing creditor. *Gil v. Her Husband*, 28.
2. The plea of discussion cannot be opposed to a creditor holding a special mortgage. C. P. 73. C. C. 3367. Nor can a third possessor of property mortgaged for a debt for which other property is also bound, require that it shall be held liable only for a *pro rata* portion of the debt. Each and every part of property mortgaged is liable for each and every portion of the debt.

Bagley v. Tate, 45.

3. A creditor whose debt is payable in instalments, and secured by mortgage, on the failure of the debtor to pay any instalment, may require the property to be sold for the payment of the whole debt, provided that the sale be for cash for so much only as is due, and for the balance on the terms of credit stipulated in the original contract. C. P. 686.

Union Bank of Louisiana v. Smith, 49.

4. The effect of the clause *de non alienando* in a mortgage, is to render void, as regards the mortgagee, any alienation or transfer of the property made in violation of the mortgage; and the mortgagee may have the property seized and sold as if no change of owners had taken place, and without making the vendee of the mortgagor a party to the executory proceedings.

Haley v. Dubois, 54.

5. Where a second mortgagee, to whom the property has been mortgaged to secure him against any liability for certain endorsements made by him for the

mortgagor, claims to be paid by preference over the first mortgagee out of the proceeds of the property sold under the first mortgage, but does not allege, nor prove that he has paid, or become liable to pay any of the notes endorsed by him, his petition must be dismissed.

Hooper v. Union Bank of Louisiana, 63.

6. To entitle an inferior mortgagee to be paid, under art. 403 of the Code of Practice, out of the property seized, in preference to one having only a general or legal mortgage, he must prove that the debtor has other property of sufficient value to satisfy the anterior general or legal mortgage.

Socell v. Cox, 68.

7. The wife has no legal or tacit mortgage nor privilege on the property of her husband, for the restitution of any donation *propter nuptias*, made to her by the latter. C. C. 2318. *Gates v. Legendre*, 74.
8. The wife's mortgage for the reimbursement of her paraphernal property, attaches only from the date of the actual receipt of the price by her husband.

Turner v. Parker, 154.

9. The only property of a debtor having been sold under a *fi. fa.*, the purchaser, after assuming the payment of certain claims, gave a twelve months' bond for the balance coming to the debtor. The conditions of the sale not having been complied with, the property was re-sold. The purchaser at the first sale having subsequently obtained a judgment against the debtor, seized in the hands of the sheriff the bond given by him to the debtor, claiming its amount out of the proceeds of the second sale. The bond was not sold but handed over to him. On a rule taken by the wife of the debtor, under art. 301 of the Code of Practice, to show cause why the proceeds of the sale should not be brought into court, and distributed among the creditors of the defendant in execution, according to their privileges and mortgages: *Held*, that the purchaser at the first sale acquired no title to the bond by its delivery to him; that it remained the property of the defendant in execution, representing the portion of the price supposed to be coming to him; and that neither he, nor the party who pretends to have acquired his rights, can claim its proceeds in opposition to the mortgage creditors of the latter, the defendant in execution. *Ib.*
10. A wife holding the first mortgage on the property of her husband, cannot, by renouncing in favor of others, injure a subsequent mortgagee, by placing before him a larger amount of mortgages than originally existed. Subsequent mortgagees in whose favor she may renounce, transferring to them all her rights, will take her place to the extent of her mortgage, and she will retain her priority over other and inferior mortgages only for the surplus of her claim, after deducting the claims of those in whose favor she renounced. *Ib.*
11. A mortgage for money which the mortgagee contracts to advance at a future time, is valid. C. C. 3259, 3260. *Hubbard v. Griffin*, 383.
12. A creditor of a succession, having a special mortgage, may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained. In this respect his wish must always prevail over that of the other creditors. C. P. 990, 991, 992. C. C. 1163.

Succession of Ogden, 457.

NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY.

The provision of the 10th section of the act of 1st March, 1836, amending the charter of the New Orleans and Carrollton Rail Road Company which, in consideration of a *bonus*, exempts the company for a certain period, from any liability to be taxed on the part of the State, does not exempt real estate held by the company, in the Second Municipality of New Orleans, from liability for taxes imposed by the municipal authorities. *Second Municipality of New Orleans v. New Orleans and Carrollton Rail Road Company*, 187.

NEW ORLEANS, CITY OF.

See NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY.

NEW ORLEANS, MASTER AND WARDENS OF PORT OF.

The fees allowed to the Master and Wardens of the port of New Orleans, by the act of 17th February, 1821, are, at least when the services for which they are claimed have been actually rendered, not inconsistent with the constitution of United States, nor with the act of Congress of 8th April, 1812, admitting the State of Louisiana into the Union.

Master and Wardens of Port of New Orleans v. Prats, 459.

NEW TRIAL.

1. A new trial should be allowed whenever justice requires it.

Wilkins v. Parish of East Baton Rouge, 57.

2. Where one sued for damages for a malicious arrest is not shown to have acted through malice, but to have had reasonable grounds to believe that he would succeed in his action, and no attempt was made to disprove the affidavit upon which the arrest was obtained, the case will be remanded for a new trial, where the damages allowed by the jury appear excessive. *Driggs v. Morgan*, 119.

NOTICE.

Notice to a former owner as to any matter connected with the property, will be binding on one who subsequently acquires it from him. *Per Curiam*: The latter can have no greater rights than the party from whom he acquired his title.

Linton v. Guillotte, 857.

NOVATION.

1. Plaintiff's intestate, as assignee of a judgment against four parties, agreed to accept from two of the debtors a title to a tract of land in satisfaction thereof, and gave a receipt on the *fi. fa.* issued on the judgment for its amount in full. The act of sale was prepared and signed by one of the two debtors, but the other died before executing it, and before he had been put in default, and his executor offered to complete the act. In an action to cancel the receipt: *Held*, that by signing the receipt on the *fi. fa.* plaintiff's intestate abandoned his rights thereunder, reserving only what he acquired against the two debtors who

contracted to give the title to the land; that one having complied with his obligation, and the other dying without having been put *in mora*, the contract with them cannot be abandoned, and the obligation of the others revived. Judgment in favor of defendants as in case of non suit.

Chapman v. Hardesty, 34.

2. A twelve months' bond is not a payment of the debt on which the execution was issued. It operates no novation, but leaves the original obligation in force against the debtor; and its proceeds, when brought into court under art. 301 of the Code of Practice, are subject to the rights which the creditors originally had on the property. *Turner v. Parker*, 154.

OFFENCES AND QUASI-OFFENCES.

1. A mere trespasser cannot defend himself, by alleging imperfections in the title of a plaintiff which is apparently good. *Stephenson v. Goff*, 99.
2. Though a writ of arrest may have been illegally obtained, the clerk who issued it, and the sheriff who executed it in obedience to the mandates of a competent tribunal, cannot be viewed as co-trespassers with the plaintiff in the suit, who alone is responsible for the consequences of the proceeding.

Driggs v. Morgan, 119.

3. In an action for damages for a malicious arrest, evidence is admissible to prove the condition of the apartment in the jail in which plaintiff was confined. *Ib.*
4. Where one sued for damages for a malicious arrest, is not shown to have acted through malice, but to have had reasonable grounds to believe that he would succeed in his action, and no attempt was made to disprove the affidavit upon which the arrest was obtained, the case will be remanded for a new trial, where the damages allowed by the jury appear excessive. *Ib.*
5. An insurance of slaves protects the insured against any loss arising from their mutiny and insurrection, unless that peril be expressly excepted or warranted against. The articles of the Civil Code rendering the owners of slaves liable for their offences and quasi-offences (C. C. 2300, &c.), do not apply to such a case, which is governed wholly by the commercial law.

McCargo v. Merchants Insurance Company of New Orleans, 334.

OPPOSITION OF THIRD PERSONS.

The 6th section of art. 298 of the Code of Practice was intended to enable the wife to prevent the husband, pending a suit for a separation of property, from disposing of the property held in community, or on which she has a privilege for her dotal rights, to her prejudice. In such a case she may obtain an injunction against her husband; but, with regard to his creditors, her remedy, when she seeks only to exercise a right of preference, is pointed out by art. 300 of the same Code, and those under which her third opposition should be conducted. *Gil v. Her Husband*, 28.

OWNERSHIP.

See AGENCY, 1.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE, I.

PARTIES.

See APPEAL, II. EVIDENCE, 35, 36, 37, 38. PLEADING, I.

PARTNERSHIP.

1. After the dissolution of a firm none of the former partners can bind the others, nor the firm, without special authority derived from a new contract.
Commercial Bank of Natchez v. Perry, 61.
2. Where a bill drawn on a commercial partnership, is accepted, after the dissolution of the firm, by one of the partners, payable at a particular bank, but he is not shown to have been authorized by his former partners to bind the firm, and demand of payment was made only at the bank, no demand having been made of the drawees, the drawer will be discharged. *Ib.*
3. The 14th section of the act of Congress of 19th August, 1841, establishing an uniform system of bankruptcy, which declares "that where two or more persons, who are partners in trade, become insolvent, an order may be made" declaring them bankrupts, "in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and all the separate estate of each of the partners, shall be taken," with certain exceptions, "and that the creditors of the company, and the separate creditors of each partner shall be allowed to prove their respective debts," &c., applies to the case of a partner in an existing partnership. It does not apply where the partnership had been dissolved previously to the application to be declared a bankrupt, made by one of its members who had been charged with the liquidation of the debts of the firm. In such a case the interest of the applicant alone vests in his assignees. *Akin v. Oakley*, 410.
4. In an action by the creditor of an insolvent, against a third person as a secret partner of the debtor, the defendant may, on the cross-examination of a witness of the plaintiff's, require him to state any declarations of the insolvent, as to the supposed connection of the latter as a partner with the defendant, made previous to the insolvency. *Per Curiam*: The answer was part of the *res gestæ*, and made at a time not suspicious. *Lacaze v. Séjour*, 444.
5. The liability of a secret or dormant partner, depending upon the mere fact of partnership, his name not being announced, and no credit being given to him personally as a supposed member, it is not necessary, in case of his withdrawal, to give any notice thereof to the public. *Ib.*

PAYMENT.

1. The holder of a warrant, drawn by the auditor on the treasurer of a parish, for a certain sum, cannot assign a part of it, without the consent of the parish autho-

- rities. The latter are not bound to pay their debts by portions ; nor will they be bound, though a draft for the part assigned was accepted by the treasurer, if he was not authorized to do so. *LeBlanc v. Parish of East Baton Rouge*, 25.
2. Plaintiff's intestate, as assignee of a judgment against four parties, agreed to accept from two of the debtors a title to a tract of land in satisfaction thereof, and gave a receipt on the *fi. fa.* issued on the judgment for its amount in full. The act of sale was prepared and signed by one of the two debtors, but the other died before executing it, and before he had been put in default, and his executor offered to complete the act. In an action to cancel the receipt: *Held*, that by signing the receipt on the *fi. fa.* plaintiff's intestate abandoned his rights thereunder, reserving only what he acquired against the two debtors who contracted to give the title to the land ; that one having complied with his obligation, and the other dying without having been put in *mora*, the contract with them cannot be abandoned, and the obligation of the others revived. Judgment in favor of defendants as in case of non suit. *Chapman v. Hardesty*, 34.
3. Payments made by one who owes a debt bearing interest, cannot, without the consent of the creditor, be imputed to the reduction of the capital, while any interest is due. C. C. 2160. *Union Bank of Louisiana v. Kindrick*, 51.
4. A twelve months' bond is not a payment of the debt on which the execution was issued. It operates no novation, but leaves the original obligation in force against the debtor ; and its proceeds, when brought into court under art. 301 of the Code of Practice, are subject to the rights which the creditors originally had on the property. *Turner v. Parker*, 154.

PLEADING.

- I. *Parties to Actions.*
- II. *Actions where to be brought.*
- III. *Petition and Amendments thereto.*
- IV. *Exceptions and Answer.*
- V. *Admissions.*
- VI. *Inadmissible Allegations.*
- VII. *Interrogatories to a Party.*

1. *Parties to Actions.*

1. Plaintiff, who had been divorced for adultery from her former husband, and married her paramour in another State, where such marriages are not, as here, forbidden by law, sued her first husband for the property she had brought into marriage, without being authorized or assisted by her present husband. On an exception to her want of authorization, after her second marriage had been proved, she offered in evidence the record of the suit of her first husband against her, and her conviction of adultery, to prove that she could not legally contract a second marriage. *Held*, that the proof of the second marriage, given in support of the exception, is sufficient to show that she is under marital authority, and that she cannot be listened to in alleging her incapacity to contract such a marriage here, resulting from her own violation of law.

Knaps v. Graugnard, 21.

2. Defendant having made a note in favor of a bank, obtained from the cashier possession of the note and a release from the debt, on substituting another debtor in his place. In an action against the maker to recover the amount of the note, on the ground that the cashier had no authority to release him : *Held*, that plaintiffs were under no obligation to cite the maker of the second note as a party to the suit. *Commissioners of the Clinton and Port Hudson Railroad Company v. Kernan—Rehearing*, 176.
3. Certain slaves were directed to be emancipated by the will of the deceased, and the will was admitted to probate, and an executor qualified, who died without having executed any part of it. No executor was appointed in his place ; but the heirs, protesting against the validity of the will, took possession of the property, which they sold, including the slaves ordered to be set free. On an application by a third person to be appointed dative testamentary executor, alleging that the succession had not been finally administered upon, as the slaves had never been emancipated, which appointment was opposed by the heirs as unnecessary : *Held*, that the facts of the case show no necessity for the appointment of an executor ; that the slaves, having been sold and passed into the hands of others, their right to freedom, which has not been impaired by the course pursued by the heirs, must be asserted contradictorily with the persons who purchased them, who are entitled to an opportunity of showing the nullity of the will. *Succession of Duplessis*, 193.
4. Where a curator *ad hoc*, appointed by the court to represent an absent defendant in a revocatory action, omits to except in the lower court to the action on the ground of the want of proper parties, the failure to make such parties will be noticed in the appellate court as if it had been specially pleaded below. *Per Curiam* : A curator *ad hoc* cannot be permitted to waive any of the legal rights of the party he represents. *Hyde v. Craddick*, 357.
5. Plaintiffs, judgment creditors of the former owner of certain real property, instituted a revocatory action against a vendee in possession, praying that the several acts of sale by which the property had been transmitted from their debtor, through successive purchasers, to the defendant, might be annulled as fraudulent, and the property declared to belong to their debtor, and subject to be seized and sold to satisfy their judgments. *Held*, that the object of the action being to annul all the conveyances as fraudulent, the intermediate vendees of the property, should have been made parties to the suit, which cannot be maintained against the defendant alone ; and that to succeed in annulling the sale, plaintiffs must show fraud in the original transaction, as well as in the successive sales, including that to the defendant. *Ib.*
6. To maintain a revocatory action to annul a contract for fraud or simulation, it is necessary to make the original debtor a party to the suit, only where the debt has not been previously liquidated by a judgment. C. C. 1970.
Dumas v. Lefebvre, 399.
7. One who claims to be the owner of property seized and in the hands of an officer of the court, must apply, by opposition as a third person, to the court from which the order of seizure was issued, directing his proceedings against

the party at whose suit the seizure was made, and not against the sheriff, who is a mere stake-holder. C. P. 397, 398. *Staples v. Bouligny*, 424.

8. No judgment can be rendered in an action against a vendor alone, on a prayer "that the plaintiff be put in possession by an undisputed title," where third persons, holding adversely, are not before the court.

Laurans v. Garnier, 425.

9. Plaintiff having instituted an action for arrears of rent against *L— & Co.*, citation was served only on one of the parties composing the firm, which was not alleged to have been a commercial one. *Held*, that the action could not be maintained against one of the members alone, as in every suit on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are presumed to have done so (C. C. 2080); that the action being against a partnership, it must be inferred that there are several defendants; that it is enough to show that all the defendants named in the petition were not cited, to entitle those cited to require a dismissal of the action; that the omission to join the proper parties, is not a matter of form, but a matter of law on which the rights of the parties depend; and that the plaintiff could not amend his petition, by substituting the name of the party cited for that of the firm, and proceed with his action. *Dougart v. Desangle*, 430.

10. Where the syndic of the creditors of an insolvent pays money without authority from the court, he cannot require that the persons so paid shall be made parties to any proceedings against him, to render him responsible for the sums thus paid. *Succession of Desorme*, 474.

II. Actions where to be brought.

11. A bank in liquidation under the act of 14th of March, 1842, cannot be sued before any other court than that under the direction of which it is being liquidated. Sec. 8. *Commissioners of New Orleans Improvement and Banking Company v. Citizens Bank of Louisiana*, 14.

III. Petition and Amendments thereto.

12. The plaintiff in a suit commenced by injunction to stay an order of seizure and sale, cannot plead in a supplemental petition, filed after the issuing of the injunction, as an offset to the defendant's claim, matters which arose subsequently to the issuing of the injunction, and presented entirely new grounds

Bagley v. Tate, 45.

13. Where in an action by the undertaker on a building contract, there is an allegation in the petition, that "if any alteration was made in the contract, or delay occasioned, it was by the order and consent of the defendant," it is sufficient to authorize the introduction of the testimony of witnesses to prove that the contract was altered with the consent of the defendant. Such evidence would also be admissible to rebut the allegations of the defendant, that the work was not completed within the time specified in, and according to the terms of the contract. *Mathias v. Lebre*t, 94.

14. The vendee of a tract of land cannot maintain an action against his vendor for delivery of the property, where there was no agreement as to a delivery at a particular time, and the petition does not aver that the latter was put *in mora*. C. C. 2461. The law considers the delivery of an immoveable as always accompanying the public act which transfers the property. C. C. 2455. *Laurans v. Garnier*, 425.
15. A misnomer of the defendants in the petition and affidavit, will be cured by the execution of a bond for the release of the property provisionally seized by the defendants in their real names. *Dougart v. Desangle*, 430.
16. An allegation in a petition, that a note was duly protested, is a sufficient averment of demand of payment. A special averment is not absolutely necessary. *Ducros v. Jacobs*, 453.
17. A party cannot complain of a sale, made by the sheriff, of real property, in block, unless it be alleged and proved that she requested the officer to sell it in separate parts. *Bauduc v. Conrey*, 466.

IV. *Exceptions and Answer.*

18. A mere trespasser cannot defend himself, by alleging imperfections in the title of a plaintiff, which is apparently good. *Stephenson v. Goff*, 99.
19. The allegation in an answer that a third person is the real plaintiff in the action, is not sufficient to exclude his testimony. *Henderson v. Western Marine and Fire Insurance Company*, 164.
20. The plea of the general issue, in an action against the endorser of a note, throws upon the plaintiff the burden of proving all the facts necessary to a recovery, to wit: demand of the maker, protest, and notice to the endorser. *Ducros v. Jacobs*, 453.
21. To recover, in a petitory action, against a party in possession claiming title, the plaintiff must not only show a better title than the defendant's, but a title as good as any which the latter can oppose to him, whether vested in the defendant or not. But the outstanding title in such third person must be a legal, subsisting, and better title than the plaintiff's; and, in fairness, should be set forth in the answer, that the plaintiff may have notice thereof. *Williams v. Riddle*, 505.
22. To recover the penalty stipulated to be paid, in case of non-compliance by defendant with a contract to deliver certain articles, plaintiff must prove that defendant was put in default previous to the commencement of suit. C. C. 2122. Putting the defendant *in mora*, is an indispensable pre-requisite to such an action. C. C. 1906. The want of it need not be specially pleaded; nor is the effect of the omission to put defendant in default waived by his setting up any special defence. *Hepp v. Commagère*, 524.

See *Parties to Actions*, 4. *Admissions*, 24. *Inadmissible Allegations*, 25. *Interrogatories to a Party*, 26.

V. *Admissions.*

23. A testator, dying without descendants, instituted one of his sisters his uni-

versal heir. Another sister and a surviving brother commenced an action against the executor of the deceased, the particular legatees, and the instituted heir, for the purpose of causing the legacies to be declared null. The instituted heir answered, through her attorney in fact, that plaintiffs could not attack the will, as the respondent, being the universal legatee of the testator, was entitled to claim the whole of his estate; averred that the dispositions of the will were legal and valid; and prayed that the petition might be dismissed, and the will maintained in all its parts. *Held*, that the averment of the validity of the will, and the prayer for its execution, do not amount to an acquiescence, on the part of the instituted heir, in the illegal dispositions, nor to a consent that the legatees shall take the legacies, notwithstanding their illegality.

Prevost v. Martel, 512.

24. An attorney in fact defending an action on behalf of his principal, unless specially empowered, cannot, by any allegations or confessions in the judicial proceedings, renounce or abandon any of the rights of his principal. *Ib.*

VI. *Inadmissible Allegations.*

25. A party cannot allege his own turpitude. *Ross v. Garlick*, 365.

VII. *Interrogatories to a Party.*

26. Defendants offered to file a supplemental answer, to which was annexed an affidavit of one of them, detailing the circumstances of a transaction relative to which they desired to interrogate the plaintiff accompanied with interrogatories requiring him to say whether the facts mentioned in the affidavit were true, and, if not, to state the facts as they occurred. Plaintiff objected to the filing of the answer, on the ground that the interrogatories were not properly propounded: *Held*, that the application to file the answer was correctly rejected, and that the court did not err in requiring the plaintiff to propound separate interrogatories as to the distinct facts, relative to which he intended to question the plaintiff. *Demarest v. Ledoux*, 189.

PREScription.

1. Prescription runs against a note payable on demand, from its date, not from that of the demand. *Per Curiam*: Prescription attaches to a right from the moment that it can be exercised. *Andrews v. Rhodes*, 52.
2. Defendant sued on a note without date, but bearing interest from a certain day, pleaded prescription, and the court, assuming that the note was made on the day from which it bore interest, gave judgment in his favor. *Held*, that the court erred in assuming that the note was made on the day from which it bore interest; and that defendant was bound to prove the facts from which relief was sought under the plea of prescription. *Ib.*
3. One holding under a vendor who sells only his right and title to the property, cannot plead prescription. *Thomas v. Kean*, 80.
4. A reconventional demand interrupts prescription; and the interruption necessarily continues until the termination of the action. *Driggs v. Morgan*, 119.

5. Where the petition was deposited in the clerk's office, by the plaintiff's attorney, before the time necessary to prescribe the action had elapsed, but, in consequence of the absence of the clerk and deputy clerk from the parish, it could not be filed, nor citation be issued until the time had elapsed, the action will not be prescribed. *Contra non valentem agere, non currit prescriptio*. And parol evidence is admissible to prove the fact of the absence of the clerk and his deputy, which rendered it impossible to institute the suit until the time had elapsed. *Smith v. Taylor*, 133.
6. The action by one who has attained majority, against his tutor, for an account of his tutorship, is prescribed by four years, commencing from the day of majority. C. C. 356. *Gourdain v. Davenport*, 173.
7. Want of sufficient time for advertising between the date of the judgment of a court of Probates ordering the sale of the property of a succession and the sale, is a defect cured by the lapse of five years. It is such an irregularity as the act of 10th March, 1834, relative to advertisements, was made expressly to remedy. See sec. 4. The act applies to proceedings and sales previous to its passage; but the prescription of five years runs only from the date of the act, as to anterior defects and informalities. *Valderes v. Bird*, 396.
8. Where a receipt has been given by the master of a steamer, acting as the agent of the owners, for firewood purchased for the use of his boat, the prescription of one year, established by art. 3499 of the Civil Code, against actions for the supply of wood or other things necessary for the construction, equipment, or provisioning of ships, steamers, or other vessels, will cease to run. Such a written acknowledgment places the claim on the footing of an ordinary personal debt, and subjects it to the prescription provided by art. 3508. Where the acknowledgment was tacit, deduced from the acts of the debtor, the nature of the prescription is not changed, but the prescription itself is only interrupted, which will run anew from the date of the interruption. *Davis v. Houren*, 402.

PRESUMPTION.

See APPEAL 10.

PRIVILEGE.

1. Neither a married woman, though entitled in virtue of her general mortgage on the property of her husband, to be paid out of the proceeds in preference to any subsequent creditor, nor any mortgage or other creditor, can arrest the sale of property seized under execution, on the mere ground of having a preference upon its proceeds. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, and may claim to have the effect of the seizure regulated as it relates to him, when he asserts a preference on the proceeds of the things seized and sold, and the court may order the amount to be retained by the sheriff, subject to its order. In such a case the sheriff may be enjoined from paying the proceeds to the seizing creditor. *Gil v. Her Husband*, 28.
2. The wife has no legal or tacit mortgage nor privilege on the property of her

husband, for the restitution of any donation *propter nuptias*, made to her by the latter. C. C. 2318. *Gates v. Legendre*, 74.

3. An undertaker who has recovered a judgment for work and labor on a building, but whose contract was never recorded, and who neither prayed for, nor was allowed any privilege by the judgment, acquires no lien on the property or its proceeds. *Turner v. Parker*, 154.

PRISON-BOUNDS BOND.

A prison-bounds bond will be binding, though it do not conform literally to the words of the statute; it is sufficient that it complies with it in substance. Thus, where a bond, instead of being made payable to the sheriff, is made directly to the party for whose benefit it was intended, such an informality cannot prevent the party interested from recovering on it. *Per Cur.* Exemption of the debtor from imprisonment is a legal consideration for the bond; and every engagement entered into for a good and lawful consideration is binding, whatever be its form. *Dunbar v. Owens*, 140.

PROHIBITION.

1. N. having obtained an injunction from a District Court to arrest the execution of a writ of possession, issued from a Probate Court, on the ground that no judgment had been rendered under which the writ could be issued, B., by whom the writ had been obtained, moved to dissolve the injunction for reasons apparent on its face. The motion was overruled, and B. answered, pleading the general issue, and averring that a judgment had been rendered under which the writ of possession was issued. While these proceedings were pending, B. applied to the Supreme Court for a writ of prohibition to the judge of the District Court, on the ground that he had exceeded his jurisdiction. *Held*, that no prohibition could be issued, when the very matter for which it is sought to be obtained is denied, and is the main point in litigation, yet untried in the lower court. *Per Curiam*: To grant a prohibition, would be to try the case on its merits, before an appeal. The want of jurisdiction in the District Court does not appear on the face of the petition; and it is not shown that the inferior judge has refused, after being made aware of the existence of a judgment of the Court of Probates, to declare his want of jurisdiction, which depends on the existence of such a judgment.

State v. Judge of the Fourth District, 169.

2. The writ of prohibition is an extraordinary one, and should be issued only in cases of great necessity, clearly shown, and where the party has applied, in vain, to the inferior tribunals for relief. *Ib.*

PUBLIC LANDS OF THE UNITED STATES.

Where it is shown that the boundary lines of the land claimed by one holding under a confirmation by the United States and a survey made by a government surveyor, were run as near as possible to a bar, the whole of which was subject to be overflowed at high water, and the greater part of it to an annual overflow, so as to include all the high land susceptible of ownership, the pro-

prietor will be entitled to the alluvion, or batture, subsequently formed on the site of the bar. *Stephenson v. Goff*, 99.

PUBLIC THINGS.

Though no particular form is required for the dedication of land to public use, the positive assent of the owner, and the fact of its being used for the public purposes intended by the appropriation, must, at least, be shown.

Linton v. Guilloite, 357.

QUASI-CONTRACTS.

1. The community of *acquêts* ceases to exist by the death of either spouse. A title to an undivided half of the property vests in the survivor and the heirs of the deceased; and if the former continue in the enjoyment of the common property, he will be bound by the obligations of a *negotiorum gestor*.

Stewart v. Pickard, 18.

2. A Court of Probates has no jurisdiction of any matters in litigation between the surviving spouse and the heirs of the deceased, arising subsequently to the dissolution of the community, particularly of such as may result from the obligations of one of the parties as a *negotiorum gestor*. *Ib.*

3. Where an agent of a third person, believing himself authorized as such to sell certain property of his principal, receives from a purchaser, who also believed that he was authorized to sell, a part of the price, which was paid over to the principal, the purchaser, on discovering the want of authority in the vendor, may recover from the principal the amount so received by him, and this, though a balance may be still due by the agent to the principal, after crediting the former with the amount paid over by him. Art. 2134 of the Civil Code does not apply to such a case. *McDonogh v. Delassus*, 481.

QUASI-OFFENCES.

See OFFENCES AND QUASI-OFFENCES.

REDHIBITORY ACTION.

See SALE, 17.

REVOCATORY ACTION.

See SALE. V.

RULE TO SHOW CAUSE.

A judgment in favor of B. against L. having been affirmed on appeal, the former, under the act of 1839, propounded interrogatories to S. & J., who had been L.'s security on his appeal bond, who answered that they were not indebted to the latter, but had in their possession effects belonging to him, deposited with them as collateral security against any liability they might be subjected to as his factors, or securities, &c. T., a creditor of B.'s, having attached the judgment in favor of the latter, against whom he had not yet obtained judgment, took a

rule in his suit against B., on the latter, on L., and on S. & J., to show cause why the effects mentioned in the answer of S. & J. to the interrogatories propounded in the first suit, should not be delivered to the sheriff to be sold, and the proceeds applied to the satisfaction of the judgment in favor of B., but deposited in court subject to its future order. *Held*, that S. & J. could not be proceeded against by a rule taken in the suit against B., to which they were strangers; and that, had they been made garnishees therein, no judgment could be obtained against them, before judgment had been rendered against B., and then only as to the effects belonging to the latter; and that the effects in their hands belonged to L., not to the debtor of T. *Lynch v. Barr*, 136.

SALE.

- I. *Requisites of the Contract of Sale, and of the Proof and Interpretation thereof.*
- II. *Obligations of Vendor.*
- III. *Obligations of Vendee.*
- IV. *Reduction of Price.*
- V. *Rescission.*
- VI. *Judicial, and other Public Sales.*

1. *Requisites of the Contract of Sale, and of the Proof and Interpretation thereof.*

1. A purchaser of moveable property, cautioned against buying on the ground, that the vendor had no authority to sell, cannot invoke the presumption of ownership resulting from the possession of his vendor. He will be liable to the owner for the value of the articles purchased. *Allen v. Hart*, 55.
2. Property claimed by a plaintiff cannot be alienated pending the action, so as to prejudice his rights. If judgment be rendered in his favor, the sale will be considered as the sale of another's property, and will not prevent his being put in possession by virtue of the judgment. C. C. 2428. *Kohn v. Byrne*, 113.
3. Parol evidence is admissible to show an agency in relation to the sale of slaves, where the object of the evidence is neither to make nor destroy the title thereto, but merely to prove an authority to negotiate as an intermediary between the owner and persons applying to purchase. *Smith v. Taylor*, 133.
4. Where a clause in a contract of sale, if interpreted literally, would be contradictory of other parts of the act and of doubtful meaning, the common intention of the parties, rather than a literal construction of the clause, should determine the interpretation. C. C. 1945. *Ross v. Garlick*, 365.
5. Though partial payments have been made to the master by a slave, for the purpose of purchasing his freedom, the latter remains the property of the master, who will continue to be entitled to all his services; and a purchaser, to whom he is afterwards sold, subject to the condition of being emancipated on his paying the supposed balance of his value, will be entitled to all his services until such balance is paid. *Per Curiam*: A slave cannot become

- partially free ; nor can he, until legally and absolutely emancipated, own any property, without the consent of his master. *François v. Lebrano*, 450.
6. The answers of a party to an action, interrogated, under art. 2255 of the Civil Code, as to a verbal sale of an immovable, denying the sale, cannot be contradicted. *Bauduc v. Conrey*, 466.
7. A plaintiff can neither require the performance, nor recover damages for the non-performance of an agreement, without legal proof of its existence *Ib.*

II. Obligations of Vendor.

8. A vendor is bound to explain himself clearly as to the extent of his obligations ; and the exhibition of a sample implies a warranty, that the thing sold by it shall, in general, conform thereto. C. C. 2449. Any secret or hidden defects must be declared, or he who conceals them will be bound to indemnify the party imposed on by such concealment. So the vendor will be bound to indemnify the purchaser, though the inferiority of the thing sold result from the acts of his agent, without his knowledge or consent ; and the measure of damages is the difference between the price given, and that which would have been given, had there been no deception. But where both the vendors, and the purchasers, or their agents, whose knowledge is binding on them, know what the probable hidden defects are, the former are not bound to indemnify the latter ; as where cotton brought from certain sections of country, is known not to be of uniform quality throughout the bale, and the notoriety of the fact lowers the price which it commands in the market, the mere fact that the quality was not equal throughout, unaccompanied with any proof of fraud will not render the vendors liable to the purchaser. *Clarke v. Lockhart*, 5.
9. A purchaser evicted from the property, has a right to recover from his vendor the price paid to him. *Laizer v. Generes*, 178.
10. A purchaser, being a possessor *bona fide*, against whom a judgment of eviction has been obtained, is entitled to be reimbursed whatever has been expended by him in useful improvements (C. C. 2485) ; and he has a right to retain the property until repaid. C. C. 3416. But the value of the improvements should be demanded from the party seeking to evict him, and the premises should not be abandoned until it is reimbursed. Where the purchaser leaves the property before being paid, or being sued, he cannot recover the value of the improvements from his vendor. *Ib.*
11. Defendants, money brokers, having purchased a treasury note of the United States, at a certain rate, resold it to the plaintiff at a small advance. On previous sales of similar notes to plaintiff, defendants had always refused to guaranty or endorse them, and no such guarantee or endorsement was asked, or expressly give, or refused on this sale. The note being proved to have been cancelled, and put in circulation by one who had stolen it, in an action by plaintiff to recover of defendants the amount paid for it : *Held*, that the latter were bound to refund the amount ; that a vendor is always presumed to guaranty the genuineness of the paper he sells, or that anything else which he offers is really what he pretends it to be ; and that his liability in this respect, if it can in any case be excluded, can be so only when expressed in the most positive manner. *Michel v. Valentine*, 404.

12. It is only where an entire failure or want of title on the part of the vendor is shown, that a purchaser is entitled to recover the price paid, without eviction, and without any previous proceedings, jointly with the vendor, to obtain possession. *Laurans v. Garnier*, 425.
13. The vendee of a tract of land cannot maintain an action against his vendor for delivery of the property, where there was no agreement as to delivery at a particular time, and the petition does not aver that the latter was put in *mora*. C. C. 2461. The law considers the delivery of an immovable as always accompanying the public act which transfers the property. C. C. 2455. *Ib.*
14. Where an agent of a third person, believing himself authorized as such to sell certain property of his principal, receives, from a purchaser who also believed that he was authorized to sell, a part of the price, which was paid over to the principal, the purchaser, on discovering the want of authority in the agent may recover from the principal the amount so received by him, and this, though a balance may still be due by the agent to the principal, after crediting the former with the amount paid over by him. Art. 2134 of the Civil Code does not apply to such a case. *McDonogh v. Delassus*, 481.

III. Obligations of Vendee.

15. Notice to a former owner, as to any matter connected with the property, will be binding on one who subsequently acquires it from him. *Per Curiam*: The latter can have no greater rights than the party from whom he acquired his title. *Linton v. Guillotte*, 357.

IV. Reduction of Price.

16. The defendant purchased from the plaintiff a tract of land and certain shares of bank stock. The land, and a number of slaves on it belonging to the plaintiff, were mortgaged to secure the payment of the stock, on which the latter had obtained a loan from the bank. Defendant agreed, as the price of the property, in addition to the payment of a certain sum, to assume the payment of the loan obtained by the plaintiff, and to release the mortgage of the bank on plaintiff's slaves. In an action by plaintiff on notes given for a part of the price, defendant claimed a diminution of the price, on account of a deficiency in the quantity of land sold of more than a twentieth. *Held*, that if the bank stock was of any value to the defendant, its value should be deducted from the whole price before proceeding to fix the ratio of diminution, and that the value of the plaintiff of the release of the mortgage, if capable of being estimated, should be added to the price; that the burden of proving the value of the stock to the defendant, was on the plaintiff; and that the proof of the value to the plaintiff of the release of the mortgage, was on the defendant.

Duplantier v. Newcomb, 103.

V. Rescission.

17. Proof of an offer by the vendor of a slave, made while the parties were in treaty to compromise the difficulties between them, to give the vendee another in place of the one sold to him, will exonerate the purchaser from the necessity of proving, in a redhibitory action, a tender of the slave.

Smith v. Taylor, 133.

18. A purchaser, not aware of the defects in his title, being a possessor in good faith, is bound to account for the fruits of the thing sold, only from the commencement of a suit for the recovery of the property. C. C. 495, 3416.

Laizer v. Generes, 178.

19. Plaintiffs, judgment creditors of the former owner of certain real property, instituted a revocatory action against a vendee in possession, praying that the several acts of sale by which the property had been transmitted from their debtor, though successive purchasers, to the defendant, might be annulled as fraudulent, and the property declared to belong to their debtor, and subject to be seized and sold to satisfy their judgments. *Held*, that the object of the action being to annul all the conveyances as fraudulent, the intermediate vendees of the property, should have been made parties to the suit, which cannot be maintained against the defendant alone; and that to succeed in annulling the sale, plaintiffs must show fraud in the original transaction, as well as in the successive sales, including that to the defendant. *Hyde v. Craddick*, 387.

20. To maintain a revocatory action to annul a contract for fraud or simulation, it is necessary to make the original debtor a party to the suit, only where the debt has not been previously liquidated by a judgment. C. C. 1970.

Dumas v. Lefebvre, 399.

21. In an action by a judgment creditor to rescind a sale of property made by his debtor as fraudulent and simulated, the vendee, when not a party to the judgment, may contest the plaintiff's demand in the same manner as the debtor might have done before judgment. C. C. 1971. *Ib.*

22. Where a judgment has been rendered in favor of the plaintiffs, in a revocatory action to rescind a sale on the ground of fraud and simulation, and the vendor alone appeals from the decision, the vendee must be cited as an appellee, or the correctness of the judgment cannot be inquired into, and the appeal must be dismissed. So the latter should be made an appellee, where the judgment having been against the plaintiffs, the latter appealed. *Ib.*

23. Where a contract of sale is attacked on the ground of fraud, parol evidence is admissible to prove the allegations of fraud upon which the contract is sought to be annulled, whenever the consent of the complaining party is shown, under the allegations, to have been the consequence of the fraud. But such evidence is inadmissible to establish a verbal agreement of the defendant to transfer real property, and a fraudulent refusal on his part to comply therewith. C. C. 2255, 2256. *Bauduc v. Conrey*, 466.

See Obligations of Vendor, . 9.

VI. Judicial, and other Public Sales.

24. Neither a married woman, though entitled, in virtue of her general mortgage on the property of her husband, to be paid out of the proceeds in preference to any subsequent creditor, nor any mortgage or other creditor, can arrest the sale of property seized under execution, on the mere ground of having a preference upon its proceeds. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, and may claim to have the effect of the seizure regulated as it re

lates to him, when he asserts a preference on the proceeds of the things seized and sold; and the court may order the amount to be retained by the sheriff, subject to its order. In such a case the sheriff may be enjoined from paying the proceeds to the seizing creditor. *Gil v. Her Husband*, 28.

25. Irregularities arising subsequent to a judicial sale, such as an irregularity in taking the bond of a purchaser, etc., cannot affect the rights acquired under the sale. But where the subsequent irregularity is rather a continuation of one existing previous to the adjudication, or has been caused by an irregularity in the proceedings previous to the sale, as where the advertisement of a sale at twelve months' credit does not state that the bond is to bear interest from the day of the adjudication at the rate allowed by the judgment, as required by art. 681 of the Code of Practice, and the bond consequently is not taken so as to bear the interest allowed by the judgment on which the execution was issued, the rule that under a forced alienation of property the purchaser will acquire no title unless the formalities of the law be strictly complied with applies, and the sale will be invalid. *Wright v. Higginbotham*, 30.
26. A sheriff, by whom real property is about to be sold, is required by law to read a certificate from the recorder of mortgages, showing all the mortgages existing on it; and he should announce that the purchaser is entitled to retain in his hands out of the price of the adjudication, the amount required to satisfy the privileged debts and special mortgages to which it is subject, taking the bond of the latter, when the sale is on a credit, only for the surplus. If the bid be insufficient to discharge anterior special mortgages, no adjudication can take place. *McRae v. Chapman*, 65.
27. Where the certificate read by the sheriff at the sale of property at twelve months credit, omits to mention a mortgage in favor of certain prior vendors of the property, and the purchaser is afterwards evicted by them, the bonds of the purchaser will be annulled, as given in error and without consideration. The omission, of itself, is enough to invalidate the adjudication. C. P. 678, 683, 684. C. C. 1813, 1818. *Ib.*
28. A purchaser at a sheriff's sale, made on twelve months' credit, under an execution in the name of the liquidating commissioners of an insolvent corporation against one of its debtors, cannot tender to the sheriff in payment or compensation of his bid, an obligation of the company. If he refuse to pay the price, or to offer the proper sureties, the sheriff must expose the thing seized to a second sale. C. P. 689. *Felps v. Commissioners of the Clinton and Port Hudson Railroad Company*, 89.
29. According to arts. 683, 684 of the Code of Practice, privileges and special mortgagees existing on property offered for sale by sheriffs, in favor of others than the seizing creditor and which are preferred to him, form a part of the price for which it may be sold; and it cannot be sold unless something be offered above their amount. The sheriff is required to announce that the purchaser may retain out of the price offered the amount of such privileged debts and special mortgages. The purchaser is bound to pay the previous incumbrances as a part of the price. If it turn out that a special mortgage or privilege, certified to exist upon the property had been extinguished, or never

attached, as where, in the case of a mortgage to secure against future endorsement, the endorser has never been made liable, the owner himself, or his creditors, in case of a surrender, may recover of the purchaser the amount thus erroneously estimated as a part of the price. *Perry v. Holloway*, 107.

30. Where property is offered for sale by a sheriff, and he does not comply with the law requiring him to announce the privileges and special mortgages existing on it, so as to make it certain what price the purchaser understood he was to pay, the sale will be null. *Ib.*

31. Where a *fi. fa.* and the sheriff's return are produced as evidence of a judicial sale, without opposition, it will be sufficient to prove the sale.

Kohn v. Byrne, 113.

32. Where property purchased by an heir at a probate sale of the succession of his mother, is resold at the risk of the purchaser on his failure to comply with the terms of the sale, and the notes given for the price by a purchaser at the second sale, are included in the active mass of the community, and the first purchaser subsequently receives his portion of the estate, he thereby ratifies the second sale, and renounces all right under the first adjudication. If the first purchaser was not put in default before the second sale, the only effect of the omission would be to defeat any claim against him for the deficiency, if the property brought less at the second sale. *Sholfield v. Rhodes*, 128.

33. A twelve months' bond is not a payment of the debt on which the execution was issued. It operates no novation, but leaves the original obligation in force against the debtor; and its proceeds, when brought into court under art. 301 of the Code of Practice, are subject to the rights which the creditors originally had on the property. *Turner v. Parker*, 154.

34. A purchaser of property sold under a *fi. fa.* having applied for a monition under the act of 10 March, 1834, the judgment creditor opposed the homologation of the sale, on the ground that the property had been incorrectly described both in the execution and the advertisement. The property was described as bounded on one side by *Clement* street, instead of *Chestnut* street, the real boundary. There was no such street as Clement street; and the description was, in other respects, accurate. Held, that the description being, in other respects, sufficiently accurate to indicate the extent and location of the property, the error, which was clearly a mistake made by the sheriff in copying the description, was immaterial, and could neither invalidate the sheriff's sale, nor support an opposition to its homologation under a monition taken out in pursuance of the act of 1834. *Ogilvie v. Rillieux*, 363.

35. Where a formal decree of a court of Probates, recognizing the necessity of selling the property inherited by minors, for the payment of the debts of the succession, was rendered after giving an opportunity to the attorney of the absent heirs to show that no such necessity existed, a purchaser of the property will not be bound to look beyond the decree. *Valderes v. Bird*, 396.

36. Where the sale of the property of a succession is made for the payment of debts, it may be sold for less than the appraised value. *Ib.*

37. Want of sufficient time for advertising between the date of the judgment of a court of Probates ordering the sale of the property of a succession and the

sale, is a defect cured by the lapse of five years. It is such an irregularity as the act of 10 March, 1834, relative to advertisements, was made expressly to remedy. See sect. 4. The act applies to proceedings and sales previous to its passage; but the prescription of five years runs only from the date of the act, as to anterior defects and informalities. *Ib.*

38. A party cannot complain of a sale, made by the sheriff, of real property, in block, unless it be alleged and proved that she requested the officer to sell it in separate parts. *Bauduc v. Conrey*, 466.

SEQUESTRATION.

1. A defendant whose property has been sequestered, pending the suit, at the instance of the plaintiff, has a right to have the sequestration set aside, on executing a bond in favor of the plaintiff with the security required by law. C. P. 279. His right to claim possession of the property, is subject to no other condition than that of giving bond. The sheriff has no right to require from him payment of any of the expenses of the sequestration, before restoring the property. The defendant will be liable therefor, only in case judgment be rendered against him. C. C. 2949. C. P. 283.

Fink v. Martin, 147.

2. Where a plaintiff who has obtained a judgment below, in a case pending before the Supreme Court on a suspensive appeal, represents that his judgment has been recorded in the mortgage office, and swears that he apprehends that the defendant will conceal, or dispose of, pending the appeal, a slave, on whom he has a mortgage resulting from the recording of the judgment, he may obtain a sequestration from the lower court. C. P. 275. Act 7th April, 1826, sec. 9. The appellee is not confined to his recourse on the surety in the appeal bond. *Ib.*

SHIPPING.

1. Where the master receipts for articles to be shipped on his vessel, as in good order, the vessel will be responsible for any damage subsequently discovered, unless clearly proved to have occurred before the delivery. And where he gives a receipt for goods left on the levée, they are as much at the risk of the ship, as if actually on board. *Barrett v. Salter*, 434.
2. Where the goods left on the levée to be shipped, are exposed to rain, and the shipper subsequently proposes to the master to ascertain the damage from the exposure, before the voyage, and the latter declines to do so, the vessel will be responsible for any increase of damage, resulting from the voyage, and the delay to which the goods are necessarily exposed in the foreign port before they could be examined. *Ib.*

ST. CHARLES HOTEL COMPANY.

The act of 25th March, 1844, incorporating the St. Charles Hotel Company, is not inconsistent with any provision of the constitution of the State, or of the United States. It does not impair the obligation of any contract, nor destroy any vested right; nor did the legislature, in its enactment, exercise any other than

legislative power. *Mudge v. Commissioners of Exchange and Banking Company*, 461.

STATUTES, CITED, EXPOUNDED, &c.

I. Statutes of the United States.

II. Statutes of the State.

I. Statutes of the United States.

1812, April 8. Admitting Louisiana into the Union. *Master and Wardens of Port of New Orleans v. Prats*, 459.

1841, August 19. Bankruptcy. *Collins v. Marshall*, 112. *Blanc v. Banks*, 115. *Flower v. Dubois*, 191. *Akin v. Oakey*, 410.

II. Statutes of the State.

1805, March 31. Fees of Master and Wardens of Port of New Orleans. *Master and Wardens of Port of New Orleans v. Prats*, 459.

—, May 4. s. 16. Burglary. *State v. Hébert*, 41.

— s. 39. Costs of conviction in criminal prosecutions. *Staples v. Bouligny*, 424.

1807, March 31, s. 13. Bail. *State v. Hébert*, 41.

1808, — 25, s. 13. Prison-bounds bond. *Dunbar v. Owens*, 139.

1813, February 10, s. 13. Supreme Court—judgments to be rendered by. *Dougart v. Desangle*, 430,

—, March 27. State taxes. *Second Municipality of New Orleans v. New Orleans and Carrollton Rail Road Company*, 187.

— 28, s. 18. Clerks and sheriffs fees. *Fink v. Martin*, 147.

1814, — 7, s. 3. — *Ib.*

1818, — 20, s. 4. Burglary. *State v. Hébert*, 41.

1819, — 3. Lease. *Bauduc v. Conrey*, 407.

1821, February 17. Fees of Master and Wardens of Port of New Orleans. *Master and Wardens of Port of New Orleans v. Prats*, 459.

1824, April 7, s. 17. Incorporating the Bank of Louisiana. *Bank of Louisiana v. Fowler*, 196.

1826, — s. 9. Sequestration. *Fink v. Martin*, 147.

1827, March 13. Protest of Bills and Notes. *Union Bank of Louisiana v. Black*, 59. *Ducros v. Jacobs*, 453.

1828, — 25, s. 6. Evidence of judges how to be taken. *Babin v. Nolan*, 373.

— s. 25. Repealing certain laws existing before promulgation of Civil Code and Code of Practice. *Dougart v. Desangle*, 430.

1831, March 25, s. 3. Injunction. *Whittemore v. Watts*, 39. *Bauduc v. Conrey*, 407.

1833, February 7. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company v. Kernan*, 174.

—, March 26. Clinton and Port Hudson Rail Road Company. *Ib.*

— 29, s. 3. Injunction. *Ib.*

- 1834, March 10. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company v. Kernan*, 174.
 ———— Assurance of titles of purchasers at judicial sales. *Ogilvie v. Rillieux*, 363.
 ———— s. 4. Prescription as to informalities in public sales. *Valderes v. Bird*, 396.
- 1835, February 9. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company v. Kernan*, 174.
- 1836, January 11. Clinton and Port Hudson Rail Road Company. *Ib.*
 ———, March 1. New Orleans and Carrollton Rail Road Company. *Second Municipality of New Orleans v. New Orleans and Carrollton Rail Road Company*, 187.
- 1837, February 15. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company v. Kernan*, 174.
 ———— 28. Authentication of foreign documents. *Andrews v. Chapman*, 188.
 ———, March 13, s. 6. Accounts of executors, administrators, curators and syndics. *Succession of Desorme*, 474, 479.
- 1838, ——— 10. Charter of Firemen's Insurance Company of New Orleans. *Brode v. Firemen's Insurance Company of New Orleans*, 440.
- 1839, ——— 20, s. 13. Interrogatories to third persons under a *fi. fa.* *Lynch v. Burr*, 136.
 ———— s. 20. Appeal. *Fink v. Martin*, 147. *Flower v. Dubois*, 191.
 ———— 28. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company v. Kernan*, 174.
- 1840, ——— 28. Abolishing imprisonment for debt. *Thornhill v. Christmas*, 543.
 ———— Act supplementary to act abolishing imprisonment for debt. *Ib.*
- 1842, March 14. Liquidation of banks. *Mudge v. Commissioners of Exchange and Banking Company of New Orleans*, 460.
 ———— s. 8. Liquidation of banks. *Commissioners of New Orleans Improvement and Banking Company v. Citizens Bank of Louisiana*, 14.
 ———— 26. Liquidation of banks. *Ib.*
- 1843, March 22, s. 1. Appeal. *McCollam v. Police Jury of Pointe Coupée*, 20.
 ———, April 5. Liquidation of banks. *Felps v. Commissioners of Clinton and Port Hudson Rail Road Company*, 89.
 ———— 6. Liquidation of Banks. *Ib.*
- 1844, March 25. Incorporating St. Charles Hotel Company. *Mudge v. Commissioners of Exchange and Banking Company of New Orleans*, 460.

STOCKHOLDER.

See FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

SUCCESSIONS.

- I. *Jurisdiction in matters of Succession.*
- II. *Probate of Will.*
- III. *Of Executors, Administrators, Curators and Syndics.*
- IV. *Claims against Successions.*
- V. *Sale of Property of Successions.*
- VI. *Of Heirs and Legatees.*
- VII. *Tableau of Distribution.*

I. *Jurisdiction in matters of Succession.*

1. A Court of Probates has no jurisdiction of any matters in litigation between the surviving spouse and the heirs of the deceased, arising subsequently to the dissolution of the community, particularly of such as may result from the obligations of one of the parties as a *negotiorum gestor*. *Stewart v. Pickard*. 18.

II. *Probate of Will.*

2. The admission of a will to probate, and the order for its execution, are but preliminary proceedings necessary to the administration of the estate; and do not amount to a judgment binding on persons not parties thereto.

Succession of Duplessis, 193.

III. *Of Executors, Administrators, Curators and Syndics.*

3. Certain slaves were directed to be emancipated by the will of the deceased, and the will was admitted to probate, and an executor qualified, who died without having executed any part of it. No executor was appointed in his place; but the heirs, protesting against the validity of the will, took possession of the property, which they sold, including the slaves ordered to be set free. On an application by a third person to be appointed dative testamentary executor, alleging that the succession had not been finally administered upon, as the slaves had never been emancipated, which appointment was opposed by the heirs as unnecessary: *Held*, that the facts of the case show no necessity for the appointment of an executor; that the slaves, having been sold and passed into the hands of others, their right to freedom, which has not been impaired by the course pursued by the heirs, must be asserted contradictorily with the persons who purchased them, who are entitled to an opportunity of showing the nullity of the will. *Succession of Duplessis*, 193.
4. Administrators are placed by law on the same footing as curators of vacant estates. They have the same powers, and are subject to the same duties and responsibilities. *Ib.*
5. Under the 6th section of the act of 13th March, 1837, requiring executors, administrators, curators, and syndics to render full and fair accounts of their administration, at least once in every twelve months, under pain of dismissal from office, and of being condemned to pay interest at the rate of ten per cent a year on all sums for which they may be responsible, from the expiration of

the twelve months, the payment of such interest is a part of the penalty, and necessarily coupled with the removal from office, and one cannot be imposed without the other; and such penalties can be inflicted only in cases which have arisen since the promulgation of the act. *Succession of Desorme*, 479.

6. The syndic of a succession found, after an examination of his accounts, to owe a balance to the estate, should be condemned, like a curator or executor, to pay interest thereon, at the rate of five per cent a year, from the date of the judgment. C. P. 1007. *Ib.*
7. The services of counsel employed to obtain the appointment of a person as executor, are to be paid by the applicant, and not by the estate, whether the application succeed or fail. *Succession of Gourjon*, 541.

See *Heirs and Legatees*, 20.

IV. Claims against Successions.

8. Art. 2377 of the Civil Code, which provides that when the hereditary property of either of the spouses has been increased or improved during the marriage, the other shall be entitled to one half of the value of such increase or amelioration if proved to have been the result of the common labor or expense, does not contemplate that to ascertain the value of such increase or improvement, every item of improvement shall be estimated separately, and the aggregate amount added to the estimation of the land. This would often be unjust, as the increased value of the property would, in many cases, be far from equal to the original cost of such improvements. *Babin v. Nolan*, 373.
9. Interest will be allowed on debts due by estates administered by curators, executors, or administrators, if the estate be sufficient, from the death of the debtor, if then due, or, from the time of becoming due, if after that event, though no judicial demand have been made (C. P. 989); but this interest cannot exceed five per cent on debts, on which a higher rate has not been stipulated in writing by the terms of the contract. *Succession of Desorme*, 474.

V. Sale of Property of Successions.

10. Where a formal decree of a Court of Probates, recognizing the necessity of selling the property inherited by minors, for the payment of the debts of the succession, was rendered after giving an opportunity to the attorney of the absent heirs to show that no such necessity existed, a purchaser of the property will not be bound to look beyond the decree. *Valderes v. Bird*, 396.
11. Where the sale of the property of a succession is made for the payment of debts, it may be sold for less than the appraised value. *Ib.*
12. Want of sufficient time for advertising between the date of the judgment of a Court of Probates ordering the sale of the property of a succession and the sale, is a defect cured by the lapse of five years. It is such an irregularity as the act of 10th March, 1834, relative to advertisements, was made expressly to remedy. See sect. 4. The act applies to proceedings and sales previous to its passage; but the prescription of five years runs only from the date of the act, as to anterior defects and informalities. *Ib.*

13. A creditor of a succession, having a special mortgage, may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained. In this respect his wish must always prevail over that of the other creditors. C. P. 990, 991, 992. C. C. 1163. *Succession of Ogden*, 457.
14. Where an administrator has been appointed to a succession, the widow in community, and the tutrix of the minors who are necessarily beneficiary heirs, have no right to interfere, and have nothing to claim until the debts of the estate are paid, and the administration legally terminated. The sale of the property of such an estate for the payment of its debts, is not subject to the formalities prescribed for the alienation of the property of minors, the beneficiary heir having but a residuary interest in the estate, which can only be ascertained by a full administration. C. C. 1148, 1151. *Ib.*

VI. Of Heirs and Legatees.

15. The will of one who died without legitimate children or descendants, contained the following provision : *J'institue pour ma légataire unique et universelle, ma sœur E. P., lui donnant et lui léguant à ce titre la généralité des biens que je délaisserai à mon décès.* Held, that this was an absolute institution of an universal heir, by which the legatee became entitled to the whole estate of the testator, and, after the death of the testator, seized of right of the effects of the succession, without being bound to demand the delivery thereof. C. C. 1599, 1602. *Prevost v. Martel*, 512.
16. Art. 1474 of the Civil Code which declares, that where the father disposes in favor of his natural children of the portion permitted by law to be so disposed of by him, he shall dispose of the rest of his property in favor of his legitimate relations, unless he bequeath the rest to some public institution, does not constitute his legitimate relations his forced heirs for the rest of his estate. He is bound to dispose of the rest of his property in favor of his legitimate relations, but he may bequeath it to such of them, one or more, as he may select. *Ib.*
17. Except in the case of accretion from legacies made to several conjointly, as provided for by arts. 1700, 1701 of the Civil Code, the legitimate heirs of a testator will inherit from him only such portion of the succession as may remain undisposed of, either because the testator has not bequeathed it to any legatee or instituted heir, or because the heir or legatee has not been able or willing to accept it. C. C. 1702. Legatees by an universal or particular title, benefit by the failure of the particular legacies which they were bound to discharge (C. C. 1697); and an universal legatee, when he concurs with a forced heir (C. C. 1603), and, *a fortiori*, when he does not, is bound to discharge all the legacies, except in case of reduction. Consequently, where a testator, dying without legitimate descendants, but leaving several brothers and sisters, institutes one of them his universal heir, such universal heir or legatee will be entitled to the benefit resulting from the failure or reduction of the particular legacies, to the exclusion of the other brothers and sisters. *Ib.*
18. Where the instituted heir consents to the execution of the particular legacy, the particular legatee cannot contest the right of the legitimate heirs to attack

his legacy as illegal. The unwillingness or refusal of the instituted heir to contest the particular legacy, cannot render it valid; and the particular legatee being incapable of receiving, and the instituted heir unwilling to accept it, the particular legacy remains undisposed of, and must, under article 1702 of the Civil Code, devolve upon the legitimate heirs. *Ib.*

19. A testator, dying without descendants, instituted one of his sisters his universal heir. Another sister and a surviving brother commenced an action against the executor of the deceased, the particular legatees, and the instituted heir, for the purpose of causing the legacies to be declared null. The instituted heir answered, through her attorney in fact, that plaintiffs could not attack the will, as the respondent, being the universal legatee of the testator, was entitled to claim the whole of his estate; averred that the dispositions of the will were legal and valid; and prayed that the petition might be dismissed, and the will maintained in all its parts. *Held*, that the averment of the validity of the will, and the prayer for its execution, do not amount to an acquiescence, on the part of an instituted heir, in the illegal dispositions, nor to a consent that the legatees shall take the legacies, notwithstanding their illegality. *Ib.*

20. A testator appointed two persons as his executors, and named two others, A. and B., to replace them, in case of the death or absence of the former, leaving a certain sum to each of those who might discharge the duties of executor. One of the persons first named having died, A. applied to be appointed executor in his place, which was opposed by B., who claimed the appointment. A. obtained a dismissal of his application as in case of non suit; and a judgment was rendered refusing to appoint B., from which the latter appealed, citing A. as appellee. Pending this appeal, A. renewed his application to the Probate Court, and was appointed executor; and from this judgment no appeal was taken. The first named executor and A. having administered on the estate, afterwards filed a tableau of distribution, by which one of the sums bequeathed to the acting executors was allowed to A., and this tableau was homologated by the Probate Court. A decision being subsequently rendered on the appeal of B., by which the latter was declared to be entitled to the appointment of executor, a rule was taken by him in the Probate Court on A., and on the first named executor, to show cause why the legacy should not be paid to him, B. The rule was made absolute, and the judgment affirmed on appeal.

Succession of Gourjon, 541.

See Sale of Property of Successions, 14.

VII. *Tableau of Distribution.*

21. The notification of the filing of the account and tableau of distribution of an executor, operates as a citation to all persons concerned, creditors as well as legatees; and the homologation of the account and tableau, bars all further enquiry as to all matters included therein. *Succession of Peytavin, 118.*

SURETY.

1. Sureties on an appeal bond are liable only where it is shown, that there is not sufficient property of the debtor to satisfy the execution. C. P. 596. This fact can be proved only by the return of the officer, charged with the execution of the judgment, showing a compliance with all the requirements of the law. A return that no property was found, and that no demand was made of the debtor, because he could not be found, without showing that any demand was made of the plaintiff in execution, his agent, or counsel, is insufficient to render the sureties liable. C. P. 726, 727. *Lynch v. Burr*, 136.
2. No proceedings can be had against the sureties on an appeal bond, where the *fi. fa.* against the debtor was returned into court before the return day. *Per Curiam*: Had the execution remained longer in the hands of the officer, he might have found property. At all events, the surety is entitled to the advantage of every legal delay. *Ib.*
3. Where a suspensive appeal, taken from a judgment recovered in a lower court and recorded in the mortgage office, leaves the judgment unreversed, the plaintiff will be bound to urge any right he may have acquired on the property of the debtor by the recording of his mortgage, before resorting to the surety on the appeal bond. C. P. 579. *Turner v. Parker*, 154.
4. From the nature and terms of the obligation of the surety on an appeal bond, no recourse can be had against him where property belonging to the mass of the creditors of the appellant, subject to certain privileges and mortgages, is yet unsold. It must in such a case be shown by the creditor, that the sale of all the effects of the principal has proved insufficient to discharge his demand. C. P. 579, 596. Act 20 March, 1839, s. 20. But where it is proved that the appellant had been declared a bankrupt under the act of Congress of 1841, and that his estate, though in course of administration, is in such a situation as to afford no reasonable ground to expect that any dividend will ever be paid to the suing creditor, he will not be bound to await the final liquidation of the bankrupt's estate, before proceeding against the surety on the appeal bond.
Flower v. Dubois, 191.
5. A surety is bound for the same thing as his principal, and cannot be bound under more onerous conditions (C. C. 3006); and no reservation which a creditor can make in a contract containing a novation of the debt, or allowing an extension of time to the principal debtor, can preserve his rights against a surety not a party to the contract. *Gustine v. Union Bank of Louisiana*, 412.
6. A judgment obtained against a surety does not change the character of his debt, nor his relation to the principal debtor; and a prolongation of time granted to the latter will release the former, in the same manner as if no judgment had been obtained. The judgment creditor can do no act, whereby the rights or recourse of the surety against the debtor may be destroyed or impaired. If he make a novation, or grant time to the principal debtor, the surety is as effectually discharged, as if the judgment had been satisfied. C. C. 2194, 3022. *Ib.*
7. The surety in a bond taken under a writ of arrest cannot be made liable, where the writ was illegally issued. *Thornhill v. Christmas*, 543.

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TAXES.

See NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

TUTOR.

See MINOR.

WARRANTY.

See SALE, 8, 9, 10, 11, 12.

WILL.

See DONATIONS MORTIS CAUSA.

END OF VOLUME X.

Ex. G. A. A.

ERRATA.

Page	29, line 7 from top, for	<i>Vanhille,</i>	substitute	<i>Vanhille.</i>
"	41, " 21 22 ———	8 May, 1805	"	31 March, 1807.
"	42, " 11 from bottom,	26	"	261.
"	47, " 9 from top,	yokes,	"	yoke.
"	71, " 15 from bottom,	Art. 1.	"	Title 1. Part 2.
"	147, " 3 from top	determination,	"	termination.
"	" " 14 ———	depending,	"	pending.
"	150, " 13 ———	determination,	"	termination.
"	361, " 11 ———	2245,	"	2265.
"	362, " 9 from bottom,	2245,	"	2265.
"	412, " 7 ———	3022,	"	3032
"	444, " 9 ———	answer was,	"	declarations were.
"	457, " 16 ———	1040, 1051,	"	1048 to 1051.
"	474, " 14 ———	939,	"	989.
"	487, " 17 from top,	vendor,	"	agent.
"	513, " 14 from bottom,	of an,	"	of the.
"	543, " " ———	security,	"	surety.
"	546, " 17 ———	vendor,	"	agent.
"	550, " 18 ———	security,	"	surety.
"	557, after line 19 from top, insert " 1004 to 1051.	Successions-	Succes-	
	<i>sion of Ogden, 457."</i>			
"	" dele line 24th from top.			

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